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OF

THE SUPREME COURT

JUNE 20 THROUGH JUNE 21, 2019

CHRISTINE LUCHOK FALLON
REPORTER OF DECISIONS

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OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective October 19, 2018, viz.:

For the District of Columbia Circuit, John G. Roberts, Jr., Chief Justice.

For the First Circuit, Stephen Breyer, Associate Justice.

For the Second Circuit, Ruth Bader Ginsburg, Associate Justice.

For the Third Circuit, Samuel A. Alito, Jr., Associate Justice.

For the Fourth Circuit, John G. Roberts, Jr., Chief Justice.

For the Fifth Circuit, Samuel A. Alito, Jr., Associate Justice.

For the Sixth Circuit, Sonia Sotomayor, Associate Justice.

For the Seventh Circuit, Brett M. Kavanaugh, Associate Justice.

For the Eighth Circuit, Neil M. Gorsuch, Associate Justice.

For the Ninth Circuit, Elena Kagan, Associate Justice.

For the Tenth Circuit, Sonia Sotomayor, Associate Justice.

For the Eleventh Circuit, Clarence Thomas, Associate Justice.

For the Federal Circuit, John G. Roberts, Jr., Chief Justice.

October 19, 2018.

(For next previous allotment, see 586 U. S., Pt. 1, p. III.)

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NOTES:

This volume provides the permanent United States Reports citation for all reported cases. Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered. Although the Table of Cases Reported does not list orders denying a petition for writ of certiorari, such orders are included chronologically in this volume.

The syllabus in a case constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337 (1906).

A list of counsel who argued or filed briefs in a reported case, and who were members of the Court's Bar at the time the case was argued, are included in the United States Reports along with the Court's opinion in the case.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2018

PDR NETWORK, LLC, ET AL. *v.* CARLTON & HARRIS CHIROPRACTIC, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 17–1705. Argued March 25, 2019—Decided June 20, 2019

Petitioners (collectively PDR) produce the Physicians' Desk Reference, which compiles information about the uses and side effects of various prescription drugs. PDR sent healthcare providers faxes stating that they could reserve a free copy of a new e-book version of the Reference on PDR's website. Respondent Carlton & Harris Chiropractic, a fax recipient, brought a putative class action in Federal District Court, claiming that PDR's fax was an "unsolicited advertisement" prohibited by the Telephone Consumer Protection Act of 1991 (Telephone Act). 47 U. S. C. §227(b)(1)(C). The District Court dismissed the case, concluding that PDR's fax was not an "unsolicited advertisement" under the Telephone Act. The Fourth Circuit vacated the District Court's judgment. Based on the Administrative Orders Review Act (Hobbs Act), which provides that courts of appeals have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain "final orders of the Federal Communication Commission," 28 U. S. C. §2342(1), the Court of Appeals held that the District Court was required to adopt the interpretation of "unsolicited advertisement" set forth in a 2006 FCC order. Because the Court of Appeals found that the 2006 order interpreted the term "unsolicited advertisement" to "include any offer of a free good or service," the Court of

Appeals concluded that the facts as alleged demonstrated that PDR's fax was an unsolicited advertisement. 883 F. 3d 459, 467.

Held: The extent to which the 2006 FCC order binds the lower courts may depend on the resolution of two preliminary sets of questions that were not aired before the Court of Appeals. First, is the order the equivalent of a "legislative rule," which is "'issued by an agency pursuant to statutory authority'" and has the "'force and effect of law'"? *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 302–303. Or is it the equivalent of an "interpretive rul[e]," which simply "'advis[es] the public of the agency's construction of the statutes and rules which it administers'" and lacks "'the force and effect of law'"? *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 97. If the order is the equivalent of an "interpretive rule," it may not be binding on a district court, and a district court therefore may not be required to adhere to it. Second, did PDR have a "prior" and "adequate" opportunity to seek judicial review of the order? 5 U. S. C. § 703. If the Hobbs Act's exclusive-review provision, which requires certain challenges to FCC orders to be brought in a court of appeals "within 60 days after" the entry of the order in question, 28 U. S. C. § 2344, did not afford PDR a "prior" and "adequate" opportunity for judicial review, it may be that the Administrative Procedure Act permits PDR to challenge the order's validity in this enforcement proceeding. The judgment of the Court of Appeals is vacated, and the case is remanded for that court to consider these preliminary issues, as well as any other related issues that may arise in the course of resolving this case. Pp. 6–8.

883 F. 3d 459, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, in which GORSUCH, J., joined, *post*, p. 8. KAVANAUGH, J., filed an opinion concurring in the judgment, in which THOMAS, ALITO, and GORSUCH, JJ., joined, *post*, p. 10.

Carter G. Phillips argued the cause for petitioners. With him on the briefs were *Kwaku A. Akowuah*, *Jeffrey N. Rosenthal*, and *Ana Tagvoryan*.

Glenn L. Hara argued the cause for respondent. With him on the brief was *D. Christopher Hedges*.

Rachel P. Kovner argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Francisco*, *Assistant Attorney Gen-*

eral Hunt, *Deputy Solicitor General Stewart*, *Mark B. Stern*, *Michael S. Raab*, *Thomas M. Johnson, Jr.*, *Jacob M. Lewis*, and *Scott M. Noveck*.*

JUSTICE BREYER delivered the opinion of the Court.

This case concerns two federal statutes, the Telephone Consumer Protection Act of 1991 (Telephone Act) and the Administrative Orders Review Act (Hobbs Act). The first statute generally makes it unlawful for any person to send an "unsolicited advertisement" by fax. 105 Stat. 2396, 47 U. S. C. §227(b)(1)(C). The second statute provides that the federal courts of appeals have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain "final orders of the Federal Communication Commission." 28 U. S. C. §2342(1).

In 2006, the FCC issued an order stating that the term "unsolicited advertisement" in the Telephone Act includes certain faxes that "promote goods or services even at no cost," including "free magazine subscriptions" and "catalogs." 21 FCC Rcd. 3787, 3814. The question here is whether the Hobbs Act's vesting of "exclusive jurisdiction" in the courts of appeals to "enjoin, set aside, suspend," or "determine the validity" of FCC "final orders" means that a

*Briefs of *amici curiae* urging reversal were filed for the State of Oklahoma et al. by *Mike Hunter*, Attorney General of Oklahoma, *Mithun Mansinghani*, Solicitor General, and *Michael K. Velchik*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Curtis T. Hill, Jr.*, of Indiana, *Jeff Landry* of Louisiana, *Doug Peterson* of Nebraska, *Ken Paxton* of Texas, and *Patrick Morrisey* of West Virginia; for State and Local Government Associations by *Ashley E. Johnson*, *Bradley G. Hubbard*, and *Lisa E. Soronen*; and for Aditya Bamzai by *Mr. Bamzai*, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for the American Bankers Association et al. by *Charles H. Kennedy* and *Thomas Pinder*; and for the Electronic Privacy Information Center by *Marc Rotenberg* and *Alan Butler*.

Megan L. Brown, *Bert W. Rein*, and *Daryl Joseffer* filed a brief for the U. S. Chamber of Commerce as *amicus curiae*.

district court must adopt, and consequently follow, the FCC's order interpreting the term "unsolicited advertisement" as including certain faxes that promote "free" goods.

We have found it difficult to answer this question, for the answer may depend upon the resolution of two preliminary issues. We therefore vacate the judgment of the Court of Appeals and remand this case so that the Court of Appeals can consider these preliminary issues.

I

Petitioners (PDR Network, PDR Distribution, and PDR Equity, collectively referred to here as PDR) produce the Physicians' Desk Reference, a publication that compiles information about the uses and side effects of various prescription drugs. PDR makes money by charging pharmaceutical companies that wish to include their drugs in the Reference, and it distributes the Reference to healthcare providers for free. In 2013, PDR announced that it would publish a new e-book version of the Reference. It advertised the e-book to healthcare providers by sending faxes stating that providers could reserve a free copy on PDR's website.

One of the fax recipients was respondent Carlton & Harris Chiropractic, a healthcare practice in West Virginia. It brought this putative class action against PDR in Federal District Court, claiming that PDR's fax violated the Telephone Act. Carlton & Harris sought statutory damages on behalf of itself and other members of the class.

According to Carlton & Harris, PDR's fax was an "unsolicited advertisement" prohibited by the Telephone Act. 47 U. S. C. §227(b)(1)(C). The Act defines "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." §227(a)(5). This provision says nothing about goods offered for free, but it does give the FCC authority to "prescribe regulations to implement"

the statute. §227(b)(2). And, as we have said, the FCC's 2006 order provides that fax messages that

> "promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the [Telephone Act's] definition. . . . '[F]ree' publications are often part of an overall marketing campaign to sell property, goods, or services." 21 FCC Rcd., at 3814.

The order also indicates, however, that faxes "that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited." *Ibid.* The order then sets forth "factors" the FCC "will consider" when determining whether "an informational communication" that contains advertising material is an "unsolicited advertisement." *Id.*, at 3814, n. 187.

The District Court found in PDR's favor and dismissed the case. It concluded that PDR's fax was not an "unsolicited advertisement" under the Telephone Act. 2016 WL 5799301 (SD W. Va., Sept. 30, 2016). The court did recognize that the FCC's order might be read to indicate the contrary. *Id.*, at *3. And it also recognized that the Hobbs Act gives appellate courts, not district courts, "exclusive jurisdiction" to "determine the validity of" certain FCC "final orders." 28 U. S. C. §2342(1). Nonetheless, the District Court concluded that neither party had challenged the order's validity. 2016 WL 5799301, *3. And it held that even if the order is presumed valid, a district court is not bound to follow the FCC interpretation announced in the order. *Id.*, at *4. In any event, the District Court also noted that a "careful reading" of the order showed that PDR's fax was not an "unsolicited advertisement" even under the FCC's interpretation of that term. *Ibid.*

Carlton & Harris appealed to the Fourth Circuit, which vacated the District Court's judgment. 883 F. 3d 459 (2018). The Court of Appeals held that "the jurisdictional command"

of the Hobbs Act—that is, the word "exclusive"—"requires a district court to apply FCC interpretations" of the Telephone Act. *Id.*, at 466. Thus, the District Court should have adopted the interpretation of "unsolicited advertisement" set forth in the 2006 order. *Ibid.* And because the order interpreted the term "advertisement" to "include any offer of a free good or service," *id.*, at 467, the facts as alleged demonstrated that PDR's fax was an unsolicited advertisement.

PDR filed a petition for certiorari. We granted certiorari to consider "[w]hether the Hobbs Act required the District Court in this case to accept the FCC's legal interpretation of the Telephone Consumer Protection Act." 586 U. S. 996 (2018).

II

The Hobbs Act says that an appropriate court of appeals has "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47." 28 U. S. C. § 2342(1); see 47 U. S. C. § 402(a) (making reviewable certain "orde[rs] of the Commission under" the Communications Act, of which the Telephone Act is part). It further provides that "[a]ny party aggrieved" may bring such a challenge in the court of appeals "within 60 days after" the entry of the FCC order in question. 28 U. S. C. § 2344.

Here, we are asked to decide whether the Hobbs Act's commitment of "exclusive jurisdiction" to the courts of appeals requires a district court in a private enforcement suit like this one to follow the FCC's 2006 order interpreting the Telephone Act. The parties in this case did not dispute below that the order is a "final order" that falls within the scope of the Hobbs Act. 883 F. 3d, at 464, n. 1. And we assume without deciding that the order is such a "final order." Even so, the extent to which the order binds the lower courts may depend on the resolution of two prelimi-

nary sets of questions that were not aired before the Court of Appeals.

First, what is the legal nature of the 2006 FCC order? In particular, is it the equivalent of a "legislative rule," which is "'issued by an agency pursuant to statutory authority'" and has the "'force and effect of law'"? *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 302–303 (1979) (quoting *Batterton* v. *Francis*, 432 U. S. 416, 425, n. 9 (1977)). Or is it instead the equivalent of an "interpretive rul[e]," which simply "'advis[es] the public of the agency's construction of the statutes and rules which it administers'" and lacks "'the force and effect of law'"? *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 97 (2015) (quoting *Shalala* v. *Guernsey Memorial Hospital*, 514 U. S. 87, 99 (1995)).

If the relevant portion of the 2006 order is the equivalent of an "interpretive rule," it may not be binding on a district court, and a district court therefore may not be required to adhere to it. That may be so regardless of whether a court of appeals could have "determin[ed]" during the 60-day review period that the order is "vali[d]" and consequently could have decided not to "enjoin, set aside, [or] suspend" it. 28 U. S. C. §2342. And that may be so no matter what degree of weight the district court ultimately gives the FCC's interpretation of the statute under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). We say "may" because we do not definitively resolve these issues here.

Second, and in any event, did PDR have a "prior" and "adequate" opportunity to seek judicial review of the order? 5 U. S. C. §703. The Administrative Procedure Act provides that "agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement" except "to the extent that [a] *prior, adequate, and exclusive opportunity for judicial review is provided by law*." *Ibid.* (emphasis added). We believe it important to determine whether the Hobbs Act's exclusive-review provision, which requires cer-

tain challenges to FCC final orders to be brought in a court of appeals "within 60 days after" the entry of the order in question, 28 U. S. C. § 2344, afforded PDR a "prior" and "adequate" opportunity for judicial review of the order. If the answer is "no," it may be that the Administrative Procedure Act permits PDR to challenge the validity of the order in this enforcement proceeding even if the order is deemed a "legislative" rule rather than an "interpretive" rule. We again say "may" because we do not definitively decide this issue here.

III

As we have said many times before, we are a court of "review," not of "first view." *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005). Because the Court of Appeals has not yet addressed the preliminary issues we have described, we vacate the judgment of the Court of Appeals and remand this case so that the Court of Appeals may consider these preliminary issues, as well as any other related issues that may arise in the course of resolving this case.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring in the judgment.

For the reasons explained by JUSTICE KAVANAUGH, the Court of Appeals misinterpreted the Hobbs Act. I write separately to address a more fundamental problem with that court's holding: It rests on a mistaken—and possibly unconstitutional—understanding of the relationship between federal statutes and the agency orders interpreting them.

The opinion below assumes that an executive agency's interpretation of a statute it administers serves as an authoritative gloss on the statutory text unless timely challenged. But for that assumption, the Hobbs Act would have no role to play in this case. This suit is a dispute between private parties, and petitioners did not ask the District Court to "en-

join, set aside, suspend," or "determine the validity of" any order of the Federal Communications Commission (FCC). 28 U. S. C. §2342(1). Indeed, they did not even initiate this suit. They simply argued that the fax at issue here was not an "unsolicited advertisement" and thus did not violate the Telephone Consumer Protection Act of 1991 (TCPA), as respondent contended. See 47 U. S. C. §§227(a)(5), (b)(1)(C). The District Court agreed, but the Fourth Circuit reversed, explaining that the FCC had adopted an order interpreting the term "unsolicited advertisement" and that, under the Hobbs Act, only the courts of appeals had jurisdiction to "determine the validity of" such orders. §2342; see 883 F. 3d 459, 464 (2018). According to the decision below, the Hobbs Act "precluded the district court from even *reaching*" the question of the TCPA's meaning because "a district court simply cannot reach [that] question without 'rubbing up against the Hobbs Act's jurisdictional bar.'" *Ibid.* (emphasis added).

As JUSTICE KAVANAUGH explains, the Fourth Circuit was incorrect. Interpreting a statute does not "determine the validity" of an agency order interpreting or implementing the statute. See *post*, at 19–23 (opinion concurring in judgment).*

A contrary view would arguably render the Hobbs Act unconstitutional. If the Act truly "precluded the district court from even reaching" the text of the TCPA and instead required courts to treat "FCC interpretations of the TCPA" as authoritative, 883 F. 3d, at 464, then the Act would trench upon Article III's vesting of the "judicial Power" in the courts. As I have explained elsewhere, "the judicial power,

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*Contrary to the majority's suggestion, *ante*, at 7, it therefore makes no difference whether the FCC order at issue here is a legislative rule or an interpretive rule. In any event, the order is clearly interpretive—it was "'issued by an agency to advise the public of the agency's construction of'" the term "unsolicited advertisement." *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 97 (2015).

as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 119 (2015) (opinion concurring in judgment). That duty necessarily entails identifying and applying the governing law. Insofar as the Hobbs Act purports to prevent courts from applying the governing statute to a case or controversy within its jurisdiction, the Act conflicts with the "province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). And to the extent the Hobbs Act requires courts to "give the 'force of law' to agency pronouncements on matters of private conduct" without regard to the text of the governing statute, the Act would be unconstitutional for the additional reason that it would "permit a body other than Congress" to exercise the legislative power, in violation of Article I. *Michigan* v. *EPA*, 576 U. S. 743, 762 (2015) (THOMAS, J., concurring). At a minimum, our constitutional-avoidance precedents would militate against the Fourth Circuit's view of the Hobbs Act.

* * *

The decision below rested on the assumption that Congress can constitutionally require federal courts to treat agency orders as controlling law, without regard to the text of the governing statute. A similar assumption underlies our precedents requiring judicial deference to certain agency interpretations. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). This case proves the error of that assumption and emphasizes the need to reconsider it.

JUSTICE KAVANAUGH, with whom JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE GORSUCH join, concurring in the judgment.

May defendants in civil enforcement actions under the Telephone Consumer Protection Act contest the Federal

Communications Commission's interpretation of the Act? The Fourth Circuit concluded that the answer is no, meaning that a district court in an enforcement action is required to adhere to the FCC's interpretation of the Act, no matter how wrong the FCC's interpretation might be. I disagree with the Fourth Circuit.

The Telephone Consumer Protection Act, or TCPA, prohibits unsolicited commercial faxes. The TCPA creates a private right of action so that the recipients of unsolicited commercial faxes can sue the senders.

Plaintiff Carlton sued PDR in Federal District Court, claiming that PDR sent an unsolicited commercial fax to Carlton in violation of the TCPA. In pursuing its TCPA claim, Carlton relied on the FCC's interpretation of the TCPA. In 2006, the FCC had opined that the TCPA proscribes unsolicited faxes that promote goods and services, *even at no cost*. In this litigation, PDR argued that the FCC's "even at no cost" interpretation is wrong (at least if taken literally) and that the District Court therefore should not follow the FCC's interpretation when interpreting the TCPA.

The Hobbs Act provides for facial, pre-enforcement review of FCC orders. To obtain such review, a party must file a petition for review in a court of appeals within 60 days of the entry of the order, a period that expired back in 2006 for this FCC order. In Carlton's view, which is supported here by the Federal Government, the Hobbs Act's provision for facial, pre-enforcement review implicitly bars district courts from reviewing agency interpretations in subsequent enforcement actions. According to Carlton, PDR therefore may not argue in this enforcement action that the FCC's interpretation of the TCPA is incorrect. The Fourth Circuit agreed with Carlton.

We granted certiorari to decide whether the Hobbs Act required the District Court in this case to accept the FCC's legal interpretation of the TCPA.

Ruling narrowly, the Court does not answer the question presented. The Court instead vacates the judgment of the Fourth Circuit and remands the case for analysis of two "preliminary issues," which, depending on how they are resolved, could eliminate the need for an answer in this case to the broader question we granted certiorari to decide. *Ante*, at 8. Under the Court's holding, if the court on remand concludes that the FCC's order was an interpretive rule (as opposed to a legislative rule) and not subject to the Hobbs Act in the first place, then PDR will be able to argue to the District Court that the FCC's interpretation of the TCPA is wrong. Or if the court on remand concludes that the opportunity back in 2006 for pre-enforcement review in a court of appeals was not "adequate" for PDR to obtain judicial review, then PDR likewise will be able to argue to the District Court that the FCC's interpretation of the TCPA is wrong.

If the court on remand does *not* reach either of those two conclusions, however, then that court will have to tackle the question that we granted certiorari to decide. I agree with the Court that we should vacate the judgment of the Fourth Circuit, but I would decide the question that we granted certiorari to decide. I would conclude that the Hobbs Act does not bar a defendant in an enforcement action from arguing that the agency's interpretation of the statute is wrong.

My analysis of that question is straightforward: The general rule of administrative law is that in an enforcement action, a defendant may argue that an agency's interpretation of a statute is wrong, at least unless Congress has expressly precluded the defendant from advancing such an argument. The Hobbs Act does not expressly preclude judicial review of an agency's statutory interpretation in an enforcement action. Therefore, in this enforcement action, PDR may argue to the District Court that the FCC's interpretation of the TCPA is wrong. The District Court is not bound by the FCC's interpretation of the TCPA. Rather, the District Court should interpret the TCPA under usual principles of

statutory interpretation, affording appropriate respect to the agency's interpretation.

The analysis set forth in this separate opinion remains available to the court on remand (if it needs to reach the question after answering the preliminary issues identified by this Court), and it remains available to other courts in the future.

I

Passed by Congress and signed by President Truman in 1950, the Hobbs Act provides in relevant part: "The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47." 28 U. S. C. §2342. Under the Hobbs Act, when the FCC issues certain regulations, any "party aggrieved" has 60 days to "file a petition to review the order in the court of appeals." §2344. If more than one petition for review is filed, the petitions are consolidated in a single court of appeals. §2112(a)(3).[1]

The point of the Hobbs Act is to force parties who want to challenge agency orders via facial, pre-enforcement challenges to do so promptly and to do so in a court of appeals. The pre-enforcement review process established by the Act avoids the delays and uncertainty that otherwise would result from multiple pre-enforcement proceedings being filed and decided over time in multiple district courts and courts of appeals.

If no one files a facial, pre-enforcement challenge to an agency order, or if a court of appeals upholds the agency's interpretation, then a party who later wants to engage in

[1] The exclusive-jurisdiction provision of the Hobbs Act also governs review of certain actions of the Department of Agriculture, Department of Transportation, Federal Maritime Commission, Nuclear Regulatory Commission, Surface Transportation Board, and Department of Housing and Urban Development. See 42 U. S. C. §§2342(2)–(7).

proscribed activity and disagrees with the agency's interpretation faces a difficult decision. The party must take the risk of engaging in the activity and then arguing against the agency's legal interpretation as a defendant in an enforcement action. The question for us is whether the Hobbs Act bars defendants in those enforcement actions from arguing that the agency incorrectly interpreted the statute. The answer is that the Act does not bar defendants from raising such an argument.

Two categories of statutes allow for facial, pre-enforcement review of agency orders.

Statutes in the first category authorize facial, pre-enforcement judicial review and expressly preclude judicial review in subsequent enforcement actions. The Clean Water Act, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), and the Clean Air Act are examples. The Clean Water Act provides for facial, pre-enforcement review of certain agency actions in a court of appeals and requires parties to seek review within 120 days. See 33 U. S. C. § 1369(b)(1). The Act expressly states that those agency orders "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." § 1369(b)(2). CERCLA provides for parties to seek pre-enforcement review of any covered regulation in the D. C. Circuit within 90 days. See 42 U. S. C. § 9613(a). Like the Clean Water Act, CERCLA expressly states that those agency orders "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." *Ibid.* Similarly, the Clean Air Act provides for parties to file pre-enforcement petitions for review in the D. C. Circuit within 60 days. See 42 U. S. C. § 7607(b)(1). The Clean Air Act, too, expressly states that those agency orders "shall not be subject to judicial review in civil or criminal proceedings for enforcement." § 7607(b)(2).

Statutes in the second category authorize facial, pre-enforcement judicial review, but are silent on the question

whether a party may argue against the agency's legal interpretation in subsequent enforcement proceedings. The Hobbs Act is an example, as are statutes that provide for review of certain Securities and Exchange Commission (SEC) and Department of Labor orders and rules. See 15 U. S. C. §§ 78y(a)(1), (3), (b)(1), (3); 29 U. S. C. § 655(f).

For that second category—the statutes that are silent about review in subsequent enforcement actions—there must be a default rule that applies absent statutory language to the contrary. The question is whether the proper default rule is (1) to preclude review by the district court of whether the agency interpretation is correct or (2) to allow review by the district court of whether the agency interpretation is correct. In my view, elementary principles of administrative law establish that the proper default rule is to allow review by the district court of whether the agency interpretation is correct. In those enforcement actions, the defendant may argue that the agency's interpretation is wrong. And the district courts are not bound by the agency's interpretation. District courts must determine the meaning of the statute under the usual principles of statutory interpretation, affording appropriate respect to the agency's interpretation.

To begin with, the "Administrative Procedure Act creates a basic presumption of judicial review for one suffering legal wrong because of agency action." *Weyerhaeuser Co.* v. *United States Fish and Wildlife Serv.*, 586 U. S. 9, 22 (2018) (quotation altered). Unless "there is persuasive reason to believe" that Congress intended to preclude judicial review, the Court will not preclude review. *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 670 (1986) (internal quotation marks omitted).

Consistent with that strong presumption of judicial review, a party traditionally has been able to raise an as-applied challenge to an agency's interpretation of a statute in an enforcement proceeding. Indeed, in 1947, the year after the

Administrative Procedure Act was enacted, the Attorney General's Manual on the Administrative Procedure Act stated: "There are many situations in which the invalidity of agency action may be set up as a defense in enforcement proceedings." Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 100 (1947).

To be sure, this Court's decision in *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1967) (*Abbott Labs*), revolutionized administrative law by *also* allowing facial, pre-enforcement challenges to agency orders, absent statutory preclusion of such pre-enforcement review. *Id.*, at 139–141. But *Abbott Labs* did not eliminate as-applied review in enforcement actions. Indeed, doing so would have thwarted a key aim of the decision, which was to expand the opportunities for judicial review by allowing *both* facial, pre-enforcement challenges *and* as-applied challenges to agency action. The *Abbott Labs* Court pointed out that only those parties who were part of the pre-enforcement suit would be "bound by the decree." *Id.*, at 154.[2] The Court did not suggest that other parties would be precluded from arguing against the legality of the agency order in enforcement actions.

The strong presumption of judicial review, the tradition of allowing defendants in enforcement actions to argue that the agency's interpretation is wrong, and this Court's landmark decision in *Abbott Labs* all suggest the proper default rule: to allow review by the district court of whether the agency interpretation is correct.

Further supporting that default rule is the fact that Congress knows how to explicitly preclude judicial review in enforcement proceedings. As noted above, the Clean Water Act, CERCLA, and the Clean Air Act all expressly preclude

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[2] If a party challenges an agency action in a facial, pre-enforcement suit, that specific party may be barred by ordinary preclusion principles from relitigating the same question against the agency in a future enforcement action. See *Abbott Labs*, 387 U. S., at 154. That scenario is not present here because PDR did not bring a facial, pre-enforcement suit in 2006.

judicial review of agency statutory interpretations in subsequent enforcement actions. The fact that Congress has expressly precluded judicial review in those statutes suggests that Congress' silence in the Hobbs Act should not be read to preclude judicial review—in other words, should not be read to bar defendants in enforcement actions from arguing that the agency's interpretation of the statute is incorrect. See *Russello* v. *United States*, 464 U. S. 16, 21–26 (1983).

The Administrative Procedure Act, 5 U. S. C. § 703, further confirms that the appropriate default rule is to allow judicial review. Section 703 provides: "Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." The Government acknowledges that § 703 "establishes a general rule that, when a defendant's liability depends in part on the propriety of an agency action, that action ordinarily can be challenged in a civil or criminal enforcement suit." Brief for United States as *Amicus Curiae* 24. Unlike the Clean Water Act, CERCLA, and the Clean Air Act, moreover, the Hobbs Act does not provide that facial, pre-enforcement review is (in § 703 terms) the "exclusive opportunity" for judicial review for purposes of § 703. More on that point later.

This Court's precedents interpreting analogous statutes lend additional support for the default rule of allowing review of the agency's interpretation in the district court enforcement action. For example, certain Department of Labor orders promulgating occupational safety and health standards are directly reviewable in the courts of appeals. See 29 U. S. C. § 655(f). In enforcement proceedings, this Court has routinely considered defendants' arguments that the Administration's interpretation of a statute is incorrect. See *Whirlpool Corp.* v. *Marshall*, 445 U. S. 1, 4, 7–8, 11 (1980). Likewise, certain SEC orders are directly reviewable in a court of appeals. See 15 U. S. C. §§ 78y(a)(1), (3), (b)(1), (3). In enforcement proceedings, this Court again has

routinely considered defendants' arguments that the SEC's interpretation of a statute is incorrect. See *United States* v. *O'Hagan*, 521 U. S. 642, 666–676 (1997); *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 212–214 (1976).

The practical consequences likewise support a default rule of allowing review. Denying judicial review of an agency's interpretation of the statute in enforcement actions can be grossly inefficient and unfair. It would be wholly impractical—and a huge waste of resources—to expect and require every potentially affected party to bring pre-enforcement Hobbs Act challenges against every agency order that might possibly affect them in the future. After all, as Justice Powell stated in a similar context, it "is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation—especially small contractors scattered across the country—would have knowledge of its promulgation or familiarity with or access to the Federal Register." *Adamo Wrecking Co.* v. *United States*, 434 U. S. 275, 290 (1978) (concurring opinion). On some occasions, the entities against whom an enforcement action is brought may not even have existed back when an agency order was issued. In short, it is unfair to expect potentially affected parties to predict the future.

In light of that unfairness, Congress traditionally takes the extraordinary step of barring as-applied review in enforcement proceedings only in those statutory schemes where the regulated parties are likely to be well aware of any agency rules and to have both the incentive and the capacity to challenge those rules immediately. The Clean Water Act, CERCLA, and the Clean Air Act generally fit that description.

By contrast, the Hobbs Act covers a wide variety of federal agency orders where potentially affected parties may not always have the incentive and the capacity to immediately challenge the orders. Consider the Department of Housing and Urban Development rules or Department of Agriculture rules that are covered by the Hobbs Act, for

example. If a party affected by a HUD rule or Department of Agriculture rule is subject to a later enforcement action, is the party precluded from arguing that the rule misinterprets the applicable statute? That would be extraordinary. Requiring all those potentially affected parties to bring a facial, pre-enforcement challenge within 60 days or otherwise forfeit their right to challenge an agency's interpretation of a statute borders on the absurd. That is no doubt why Congress rarely does so.

Indeed, that unfairness raises a serious constitutional issue. Barring defendants in as-applied enforcement actions from raising arguments about the reach and authority of agency rules enforced against them raises significant questions under the Due Process Clause. In *Adamo Wrecking*, Justice Powell concurred to say that the preclusion-of-review provision of the Clean Air Act raises constitutional issues that "merited serious consideration." *Id.*, at 289. The D. C. Circuit likewise has stated that provisions of that sort raise a "substantial due process question." *Chrysler Corp.* v. *EPA*, 600 F. 2d 904, 913 (1979). We can avoid some of those due process concerns by adhering to a default rule of permitting judicial review of agency legal interpretations in enforcement actions.

All of those considerations taken together lead to a very simple principle: When Congress intends to eliminate as-applied judicial review of agency interpretation of statutes in enforcement actions, Congress can, must, and does speak clearly. We cannot presume that Congress *silently* intended to preclude judicial review of agency interpretations of statutes in enforcement actions. Rather, the default rule is to allow defendants in enforcement actions to argue that the agency's interpretation of the statute is wrong, unless Congress expressly provides otherwise.

II

Unlike the Clean Water Act, CERCLA, and the Clean Air Act, the Hobbs Act does not expressly preclude review in

enforcement actions. Supporting respondent Carlton's position here, the Government offers four arguments that the Hobbs Act should nonetheless be interpreted to bar district court review of an agency's interpretation in an enforcement proceeding. None is persuasive.

First, the Hobbs Act provides that the court of appeals in a facial, pre-enforcement challenge has "exclusive jurisdiction" to "enjoin, set aside, suspend (in whole or in part), or to determine the validity" of the agency order. 28 U. S. C. § 2342. All agree that this "exclusive jurisdiction" language means, at a minimum, that an aggrieved party may not bring a facial, pre-enforcement action either (1) in a district court or (2) more than 60 days after entry of the order. The Government contends that the Hobbs Act's reference to "exclusive jurisdiction" accomplishes more than that, however. The Government argues that the Act's reference to "exclusive jurisdiction" also bars judicial review of the agency's interpretation in subsequent enforcement proceedings. The Government's argument would mean that the district court in an enforcement proceeding is required to follow the agency's interpretation when deciding the case, no matter how wrong the agency's interpretation might be.

The first problem for the Government is that, unlike the Clean Water Act, CERCLA, and the Clean Air Act, the Hobbs Act does not expressly preclude as-applied judicial review of an agency interpretation in subsequent enforcement proceedings. Unlike those other Acts, the Hobbs Act does not say that agency orders "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U. S. C. § 1369(b)(2).

But the Government seizes on the Hobbs Act's "exclusive jurisdiction" language. So the question is this: The exclusive jurisdiction specified by the Hobbs Act is "exclusive jurisdiction" to do what? The Act says "exclusive jurisdiction" to "enjoin, set aside, suspend," or "determine the validity" of the order. Those phrases afford the court of appeals

exclusive jurisdiction to issue an injunction or declaratory judgment regarding the agency's order. See 28 U. S. C. § 2349.

The Government argues that if the district court could disagree with the agency's interpretation in an enforcement proceeding, the district court would be "determin[ing] the validity" of the order in violation of the Hobbs Act's grant of exclusive jurisdiction to the court of appeals in the initial 60-day period. That is incorrect. In this context, a court "determines the validity" of the order only by entering a declaratory judgment that the order is valid or invalid. Critically, if a district court in an enforcement action disagrees with the agency interpretation, the district court does not issue a declaratory judgment or an injunction against the agency. Rather, the district court simply determines that the defendant is not liable under the correct interpretation of the statute. In other words, in an enforcement action, a district court does not determine the validity of the agency order.

That conclusion becomes even more apparent when we consider what ensues from the action taken by the relevant court. If the court of appeals in a facial, pre-enforcement action determines that the order is invalid and enjoins it, the agency can no longer enforce the order. By contrast, if the district court disagrees with the agency's interpretation in an enforcement action, that ruling does not invalidate the order and has no effect on the agency's ability to enforce the order against others. That contrast shows that the district court does not "determine the validity" of an order when the district court agrees or disagrees with the agency interpretation in an enforcement action.

That conclusion finds further support in analogous statutes. As noted above, certain SEC orders and rules are subject to pre-enforcement review in a court of appeals. See 15 U. S. C. §§ 78y(a)(1), (3), (b)(1), (3). The court of appeals has "exclusive" jurisdiction to "affirm or modify and

enforce or to set aside the order in whole or in part" or to "affirm and enforce or to set aside the rule." §§ 78y(a)(3), (b)(3). But despite the "exclusive" jurisdiction language, that provision has never been read to bar subsequent district court review of the SEC's interpretation of a statute in an enforcement proceeding. See *O'Hagan*, 521 U. S., at 666–676; *Ernst & Ernst*, 425 U. S., at 212–214.

In short, the text of the Hobbs Act is best read to mean that PDR can argue that the agency's interpretation of the TCPA is wrong. And the District Court can decide what the statute means under the usual principles of statutory interpretation, affording appropriate respect to the agency's interpretation. By doing so, the District Court will not "determine the validity" of the agency order in violation of 28 U. S. C. § 2342.

Even if the text of § 2342 is deemed ambiguous, ambiguity is not enough to deprive a party of judicial review of the agency's interpretation in an enforcement action. To deprive a defendant such as PDR the opportunity to contest the agency's interpretation, Congress must expressly preclude review. The Hobbs Act does not do so.

Second, the Government contends that one of this Court's cases—*Yakus* v. *United States*, 321 U. S. 414 (1944)—already interpreted a statute similar to the Hobbs Act to bar as-applied review in enforcement actions. The Government incorrectly reads that decision.

In *Yakus*, the Court considered whether the facial, pre-enforcement procedure prescribed by the Emergency Price Control Act of 1942 for determining the validity of pricing orders barred as-applied review in enforcement actions.

The defendants in *Yakus* had been tried and convicted of selling wholesale cuts of beef at prices exceeding the maximum price prescribed by regulation. The defendants did not use the procedure established by the Emergency Price Control Act to raise a facial, pre-enforcement challenge to the price regulation. But they did raise a challenge to the

legality of the regulation as part of their defense to the criminal prosecution.

Section 204(d) of the Emergency Price Control Act contained two key sentences. The first sentence said that a specially created federal court had "exclusive jurisdiction to *determine the validity* of any regulation or order." 56 Stat. 33 (emphasis added). That first sentence is roughly akin to the language in the Hobbs Act. The second sentence said: "Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to *consider the validity* of any such regulation, order, or price schedule." *Ibid.* (emphasis added). That second sentence is not replicated in the Hobbs Act, but is roughly akin to the preclusion-of-review provisions in the modern Clean Water Act, CERCLA, and Clean Air Act.

According to the *Yakus* Court, the first sentence of the Emergency Price Control Act, which gave a specific court exclusive jurisdiction to determine the validity of certain regulations, "*coupled with the provision*" that explicitly provided that no other court had jurisdiction to consider the validity of those same regulations, deprived the district court of power to consider the relevant price regulation. *Yakus*, 321 U. S., at 430 (emphasis added).

By its use of the phrase "coupled with," the Court made plain that those two sentences of the Emergency Price Control Act *together* barred district court review. The first sentence alone was not enough. Importantly, moreover, *Yakus* did not treat the second sentence of the Emergency Price Control Act as redundant of or as a restatement of the first. On the contrary, the Court recognized that the two provisions accomplish separate objectives. The first sentence gave a particular court exclusive jurisdiction to decide a facial, pre-enforcement challenge. But the word "exclusive" did not on its own bar any subsequent review in as-applied enforcement actions. If it had, then the second sentence of the Emergency Price Control Act would not have been nec-

essary. Yet the Act included the second sentence and, importantly, the *Yakus* Court then relied expressly on that second sentence as part of the basis for finding review precluded in subsequent enforcement proceedings.

Six years after *Yakus*, Congress enacted the Hobbs Act. The Government here contends that Congress modeled the Hobbs Act on the Emergency Price Control Act. But Congress did not incorporate both sentences of the relevant statutory language from the Emergency Price Control Act into the Hobbs Act. In enacting the Hobbs Act, Congress incorporated something resembling the first sentence of the Emergency Price Control Act granting the court of appeals exclusive jurisdiction to entertain facial, pre-enforcement challenges to determine the validity of agency action. But Congress did not incorporate the second sentence of the Emergency Price Control Act, which stated that no other court had jurisdiction even "to *consider*" those same agency orders. In the Hobbs Act, in other words, Congress did *not* include the language from the Emergency Price Control Act that, as interpreted in *Yakus*, would have expressly communicated Congress' intent to preclude district courts from considering the validity of certain regulations.

In relying on *Yakus*, the Government disregards that critical difference between the text of the Emergency Price Control Act and the text of the Hobbs Act. Because the text of the Emergency Price Control Act differs significantly from the text of the Hobbs Act, the Government is incorrect that *Yakus* supports the Government's interpretation of the Hobbs Act. Indeed, if anything, *Yakus* supports the contrary interpretation of the Hobbs Act because *Yakus* expressly rested its no-judicial-review conclusion in part on a sentence of the Emergency Price Control Act that Congress left out of the Hobbs Act.

One more point on *Yakus*: The Government's reliance on that decision is problematic for yet another reason. *Yakus* was a wartime case, where the need for quick and definitive

judicial rulings on the legality of agency orders was at its apex. That wartime need renders *Yakus*, in Justice Powell's words, "at least arguably distinguishable" in civil enforcement proceedings. *Adamo Wrecking*, 434 U. S., at 290 (concurring opinion).

In short, as *Yakus* makes clear, the phrase "exclusive jurisdiction to determine the validity" does not itself bar subsequent district court review of the agency's interpretation in enforcement proceedings. And when we return to the Hobbs Act, the same conclusion holds: The phrase "exclusive jurisdiction" to "determine the validity" does not bar subsequent district court review in enforcement proceedings.

Third, the Government suggests that as-applied review in district courts is not necessary because an affected party who did not bring a facial, pre-enforcement challenge can always petition the agency for reconsideration, reopening, a new rulemaking, a declaratory order, or the like, and then obtain judicial review of the agency's denial. The Government's argument is wrong.

To begin with, if the Government supports judicial review after the initial Hobbs Act period, then why force review into that convoluted route rather than just supporting judicial review in an enforcement action? The Government has no answer.

More fundamentally, the Government's promise of an alternative path of judicial review is empty. The Government acknowledges that judicial review may not always be available under that route. And even if judicial review is available, it may only be deferential judicial review of the agency's discretionary decision to decline to take new action, not judicial review of the agency's initial interpretation of the statute. As a result, the Government's promise of an alternative path of judicial review is illusory and does not supply a basis for denying judicial review in district court enforcement actions.

Fourth, the Government suggests that it would be a practical problem for agencies if the Hobbs Act did not bar as-applied review of agency interpretations in enforcement actions. That policy-laden argument cannot overcome the text of the statute and the traditional administrative law practice.

In any event, the argument is unpersuasive even on its own terms. If an agency order is upheld in a facial, pre-enforcement challenge, but then a district court and different court of appeals disagree with the agency's interpretation in a future as-applied challenge, that will create a circuit split on the interpretation of the law and likely trigger review in this Court. The Government does not like that possibility. The Government would prefer to choke off all litigation at the pass. But circuit splits and this Court's review happen all the time with all kinds of federal laws. There is no reason to think that Congress wanted to short-circuit that ordinary system of judicial review for the many agencies and multiplicity of agency orders encompassed by the Hobbs Act. And there is certainly no basis to interpret a *silent* statute as achieving that extraordinary close-the-courthouse-door outcome. To be sure, as it has done with the Clean Water Act, CERCLA, and the Clean Air Act, Congress can expressly preclude as-applied review in enforcement actions (subject to constitutional constraints). But we should not lightly conclude that Congress wanted to simultaneously deny judicial review in enforcement actions; blindside defendants who would not necessarily have anticipated that they should have filed a facial, pre-enforcement challenge; insulate agencies from circuit splits; and render this Court's review of major agency orders less likely. That would pack a lot of congressional punch into a few oblique words in the Hobbs Act.

To the extent we consider practical considerations, moreover, they cut against the Government. Under the Government's position, when the initial window for facial, pre-

enforcement review closes, no one is able to argue in court that the regulation is inconsistent with the statute—no matter how wrong the agency's interpretation might be. The effect is to transform the regulation into the equivalent of a statute. In other words, the Government's argument means that the District Court would have to afford the agency not mere *Skidmore* deference or *Chevron* deference, but absolute deference. Not *Skidmore* deference or *Chevron* deference, but *PDR* abdication. See *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

* * *

In sum, the Hobbs Act does not expressly preclude judicial review of agency legal interpretations in enforcement actions. Therefore, the Hobbs Act does not bar PDR from arguing that the FCC's legal interpretation of the TCPA is incorrect. The District Court is not bound by the FCC's interpretation. In an as-applied enforcement action, the district court should interpret the statute as courts traditionally do under the usual principles of statutory interpretation, affording appropriate respect to the agency's interpretation.

Under the Court's holding today, if the court on remand concludes that the FCC's order was not subject to the Hobbs Act in the first place, PDR will be able to argue that the FCC's interpretation of the TCPA is incorrect. Or if the court concludes that pre-enforcement review was not adequate for PDR, then PDR likewise will be able to argue that the FCC's interpretation of the TCPA is incorrect. If the court on remand reaches neither of those conclusions, however, then the court on remand will confront the question that we granted certiorari to decide and that is analyzed in this separate opinion. For the reasons I have explained, I would conclude that PDR may argue that the FCC's interpretation of the TCPA is incorrect, and that the District

Court is not required to accept the FCC's interpretation of the TCPA.

I respectfully concur in the judgment.

Syllabus

AMERICAN LEGION ET AL. *v.* AMERICAN HUMANIST ASSN. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 17–1717. Argued February 27, 2019—Decided June 20, 2019*

In 1918, residents of Prince George's County, Maryland, formed a committee for the purpose of erecting a memorial for the county's soldiers who fell in World War I. The committee decided that the memorial should be a cross, which was not surprising since the plain Latin cross had become a central symbol of the war. The image of row after row of plain white crosses marking the overseas graves of soldiers was emblazoned on the minds of Americans at home. The memorial would stand at the terminus of another World War I memorial—the National Defense Highway connecting Washington to Annapolis. When the committee ran out of funds, the local American Legion took over the project, completing the memorial in 1925. The 32-foot-tall Latin cross displays the American Legion's emblem at its center and sits on a large pedestal bearing, *inter alia*, a bronze plaque that lists the names of the 49 county soldiers who had fallen in the war. At the dedication ceremony, a Catholic priest offered an invocation and a Baptist pastor offered a benediction. The Bladensburg Cross (Cross) has since been the site of patriotic events honoring veterans on, *e. g.*, Veterans Day, Memorial Day, and Independence Day. Monuments honoring the veterans of other conflicts have been added in a park near the Cross. As the area around the Cross developed, the monument came to be at the center of a busy intersection. In 1961, the Maryland-National Capital Park and Planning Commission (Commission) acquired the Cross and the land where it sits, but the American Legion reserved the right to continue using the site for ceremonies. The Commission has used public funds to maintain the monument ever since.

In 2014, the American Humanist Association (AHA) and others filed suit in District Court, alleging that the Cross's presence on public land and the Commission's maintenance of the memorial violate the First Amendment's Establishment Clause. The American Legion intervened to defend the Cross. The District Court granted summary judgment

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*Together with No. 18–18, *Maryland-National Capital Park and Planning Commission* v. *American Humanist Assn. et al.*, also on certiorari to the same court.

for the Commission and the American Legion, concluding that the Cross satisfies both the test announced in *Lemon* v. *Kurtzman*, 403 U. S. 602, and the analysis applied by JUSTICE BREYER in upholding a Ten Commandments monument in *Van Orden* v. *Perry*, 545 U. S. 677. The Fourth Circuit reversed.

Held: The judgment is reversed and remanded.

874 F. 3d 195, reversed and remanded.

JUSTICE ALITO delivered the opinion of the Court with respect to Parts I, II–B, II–C, III, and IV, concluding that the Bladensburg Cross does not violate the Establishment Clause. Pp. 52–60, 63–66.

(a) At least four considerations show that retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones. *First*, these cases often concern monuments, symbols, or practices that were first established long ago, and thus, identifying their original purpose or purposes may be especially difficult. See *Salazar* v. *Buono*, 559 U. S. 700. *Second*, as time goes by, the purposes associated with an established monument, symbol, or practice often multiply, as in the Ten Commandments monuments addressed in *Van Orden* and *McCreary County* v. *American Civil Liberties Union of Ky.*, 545 U. S. 844. Even if the monument's original purpose was infused with religion, the passage of time may obscure that sentiment and the monument may be retained for the sake of its historical significance or its place in a common cultural heritage. *Third*, the message of a monument, symbol, or practice may evolve, *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 477, as is the case with a city name like Bethlehem, Pennsylvania; Arizona's motto "*Ditat Deus*" ("God enriches"), adopted in 1864; or Maryland's flag, which has included two crosses since 1904. Familiarity itself can become a reason for preservation. *Fourth*, when time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community. The passage of time thus gives rise to a strong presumption of constitutionality. Pp. 52–57.

(b) The cross is a symbol closely linked to World War I. The United States adopted it as part of its military honors, establishing the Distinguished Service Cross and the Navy Cross in 1918 and 1919, respectively. And the fallen soldiers' final resting places abroad were marked by white crosses or Stars of David, a solemn image that became inextricably linked with and symbolic of the ultimate price paid by 116,000 soldiers. This relationship between the cross and the war may not have been the sole or dominant motivation for the design of the many war memorials that sprang up across the Nation, but that is all but impossi-

ble to determine today. The passage of time means that testimony from the decisionmakers may not be available. And regardless of the original purposes for erecting the monument, a community may wish to preserve it for very different reasons, such as the historic preservation and traffic-safety concerns noted here. The area surrounding a monument like the Bladensburg Cross may also have been altered in ways that change its meaning and provide new reasons for its preservation. Even the AHA recognizes that the monument's surroundings are important, as it concedes that the presence of a cross monument in a cemetery is unobjectionable. But a memorial's placement in a cemetery is not necessary to create the connection to those it honors. Memorials took the place of gravestones for those parents and other relatives who lacked the means to travel to Europe to visit the graves of their war dead and for those soldiers whose bodies were never recovered. Similarly, memorials and monuments honoring important historical figures *e. g.*, Dr. Martin Luther King, Jr., often include a symbol of the faith that was important to the persons whose lives are commemorated. Finally, as World War I monuments have endured through the years and become a familiar part of the physical and cultural landscape, requiring their removal or alteration would not be viewed by many as a neutral act. Few would say that California is attempting to convey a religious message by retaining the many city names, like Los Angeles and San Diego, given by the original Spanish settlers. But it would be something else entirely if the State undertook to change those names. Much the same is true about monuments to soldiers who sacrificed their lives for this country more than a century ago. Pp. 57–60.

(c) Applying these principles here, the Bladensburg Cross does not violate the Establishment Clause. The image of the simple wooden cross that originally marked the graves of American soldiers killed in World War I became a symbol of their sacrifice, and the design of the Bladensburg Cross must be understood in light of that background. That the cross originated as a Christian symbol and retains that meaning in many contexts does not change the fact that the symbol took on an added secular meaning when used in World War I memorials. The Cross has also acquired historical importance with the passage of time, reminding the townspeople of the deeds and sacrifices of their predecessors as it stands among memorials to veterans of later wars. It has thus become part of the community. It would not serve that role had its design deliberately disrespected area soldiers, but there is no evidence that the names of any area Jewish soldiers were either intentionally left off the memorial's list or included against the wishes of their families. The AHA tries to connect the Cross and the American Legion with anti-Semitism and the Ku Klux Klan, but the monument,

which was dedicated during a period of heightened racial and religious animosity, includes the names of both Black and White soldiers; and both Catholic and Baptist clergy participated in the dedication. It is also natural and appropriate for a monument commemorating the death of particular individuals to invoke the symbols that signify what death meant for those who are memorialized. Excluding those symbols could make the memorial seem incomplete. This explains why Holocaust memorials invariably feature a Star of David or other symbols of Judaism and why the memorial at issue features the same symbol that marks the graves of so many soldiers near the battlefields where they fell. Pp. 63–66.

(d) The fact that the cross is undoubtedly a Christian symbol should not blind one to everything else that the Bladensburg Cross has come to represent: a symbolic resting place for ancestors who never returned home, a place for the community to gather and honor all veterans and their sacrifices for this Nation, and a historical landmark. For many, destroying or defacing the Cross would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment. P. 66.

JUSTICE ALITO, joined by THE CHIEF JUSTICE, JUSTICE BREYER, and JUSTICE KAVANAUGH, concluded in Parts II–A and II–D:

(a) *Lemon* ambitiously attempted to fashion a test for all Establishment Clause cases. The test called on courts to examine the purposes and effects of a challenged government action, as well as any entanglement with religion that it might entail. The expectation of a ready framework has not been met, and the Court has many times either expressly declined to apply the test or simply ignored it. See, *e. g.*, *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1; *Town of Greece* v. *Galloway*, 572 U. S. 565. Pp. 48–52.

(b) The *Lemon* Court ambitiously attempted to find a grand unified theory of the Establishment Clause, but the Court has since taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance. The cases involving prayer before legislative sessions are illustrative. In *Marsh* v. *Chambers*, 463 U. S. 783, the Court upheld a state legislature's practice of beginning each session with a prayer by an official chaplain, finding it highly persuasive that Congress for over 200 years had opened its sessions with a prayer and that many state legislatures had followed suit. And the Court in *Town of Greece* reasoned that the historical practice of having, since the First Congress, chaplains in Congress showed "that the Framers considered legislative prayer a benign acknowledgment of religion's role in society." 572 U. S., at 576. Where monuments, symbols, and practices with a longstanding history follow in the tradition of the First

Congress in respecting and tolerating different views, endeavoring to achieve inclusivity and nondiscrimination, and recognizing the important role religion plays in the lives of many Americans, they are likewise constitutional. Pp. 60–63.

JUSTICE THOMAS, agreeing that the Bladensburg Cross is constitutional, concluded:

(a) The text and history of the Clause—which reads "Congress shall make no law respecting an establishment of religion"—suggest that it should not be incorporated against the States. When the Court incorporated the Clause in *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 15, it apparently did not consider that an incorporated Establishment Clause would prohibit exactly what the text of the Clause seeks to protect: state establishments of religion. The appropriate question is whether any longstanding right of citizenship restrains the States in the establishment context. Further confounding the incorporation question is the fact that the First Amendment by its terms applies only to "law[s]" enacted by "Congress." Pp. 73–75.

(b) Even if the Clause applied to state and local governments in some fashion, "[t]he mere presence of the monument along [respondents'] path involves no [actual legal] coercion," the *sine qua non* of an establishment of religion. *Van Orden* v. *Perry*, 545 U. S. 677, 694 (opinion of THOMAS, J.). The plaintiff claiming an unconstitutional establishment of religion must demonstrate that he was actually coerced by government conduct that shares the characteristics of an establishment as understood at the founding. Respondents have not demonstrated that maintaining a religious display on public property shares any of the historical characteristics of an establishment of religion. *Town of Greece* v. *Galloway*, 572 U. S. 565, 608 (same). The Bladensburg Cross is constitutional even though the cross has religious significance. Religious displays or speech need not be limited to those considered nonsectarian. Insisting otherwise is inconsistent with this Nation's history and traditions, *id.*, at 578–580 (majority opinion), and would force the courts "to act as supervisors and censors of religious speech," *id.*, at 581. Pp. 75–77.

(c) The plurality rightly rejects the relevance of the test set forth in *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613, to claims like this one, which involve religiously expressive monuments, symbols, displays, and similar practices, but JUSTICE THOMAS would take the logical next step and overrule the *Lemon* test in all contexts. The test has no basis in the original meaning of the Constitution; it has "been manipulated to fit whatever result the Court aimed to achieve," *McCreary County* v. *American Civil Liberties Union of Ky.*, 545 U. S. 844, 900 (Scalia, J., dissenting); and it continues to cause enormous confusion in the States and the lower courts. Pp. 78–79.

Syllabus

JUSTICE GORSUCH, joined by JUSTICE THOMAS, concludes that a suit like this one should be dismissed for lack of standing. Pp. 79–89.

(a) The American Humanist Association claims that its members come into regular, unwelcome contact with the Bladensburg Cross when they drive through the area, but this "offended observer" theory of standing has no basis in law. To establish standing to sue consistent with the Constitution, a plaintiff must show: (1) injury-in-fact, (2) causation, and (3) redressability. And the injury-in-fact must be "concrete and particularized." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560. This Court has already rejected the notion that offense alone qualifies as a "concrete and particularized" injury sufficient to confer standing, *Diamond* v. *Charles*, 476 U. S. 54, 62, and it has done so in the context of the Establishment Clause itself, see *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464. Offended observer standing is deeply inconsistent, too, with many other longstanding principles and precedents, including the rule that "'generalized grievances' about the conduct of Government" are insufficient to confer standing to sue, *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208, 217, and "the rule that a party 'generally must assert his own legal rights and interests,'" not those "'of third parties,'" *Kowalski* v. *Tesmer*, 543 U. S. 125, 129. Pp. 79–83.

(b) Lower courts invented offended observer standing for Establishment Clause cases in response to *Lemon* v. *Kurtzman*, 403 U. S. 602, reasoning that if the Establishment Clause forbids anything that a reasonable observer would view as an endorsement of religion, then such an observer must be able to sue. *Lemon*, however, was a misadventure, and the Court today relies on a more modest, historically sensitive approach, interpreting the Establishment Clause with reference to historical practices and understandings. The monument here is clearly constitutional in light of the Nation's traditions. Although the plurality does not say it in as many words, the message of today's decision for the lower courts must be this: whether a monument, symbol, or practice is old or new, apply *Town of Greece* v. *Galloway*, 572 U. S. 565, not *Lemon*, because what matters when it comes to assessing a monument, symbol, or practice is not its age but its compliance with ageless principles. Pp. 83–87.

(c) With *Lemon* now shelved, little excuse will remain for the anomaly of offended observer standing, and the gaping hole it tore in standing doctrine in the courts of appeals should now begin to close. Abandoning offended observer standing will mean only a return to the usual demands of Article III, requiring a real controversy with real impact on real persons to make a federal case out of it. Pp. 87–88.

ALITO, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–B, II–C, III, and IV, in which

Syllabus

ROBERTS, C. J., and BREYER, KAGAN, and KAVANAUGH, JJ., joined, and an opinion with respect to Parts II–A and II–D, in which ROBERTS, C. J., and BREYER and KAVANAUGH, JJ., joined. BREYER, J., filed a concurring opinion, in which KAGAN, J., joined, *post*, p. 66. KAVANAUGH, J., filed a concurring opinion, *post*, p. 68. KAGAN, J., filed an opinion concurring in part, *post*, p. 73. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 73. GORSUCH, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 79. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined, *post*, p. 89.

Neal Kumar Katyal argued the cause for petitioner in No. 18–18. With him on the briefs were *Mitchell P. Reich*, *Adrian R. Gardner*, *William C. Dickerson*, and *Tracey A. Harvin*.

Michael A. Carvin argued the cause for petitioners in No. 17–1717. With him on the briefs were *Christopher DiPompeo*, *Kelly J. Shackelford*, *Hiram S. Sasser III*, *Kenneth A. Klukowski*, *Roger L. Byron*, and *Michael D. Berry*.

Acting Solicitor General Wall argued the cause for the United States as *amicus curiae* urging reversal in both cases. With him on the brief were *Assistant Attorney General Clark*, *Deputy Solicitor General Kneedler*, *Frederick Liu*, *Andrew C. Mergen*, *Lowell V. Sturgill, Jr.*, and *Joan M. Pepin*.

Monica L. Miller argued the cause and filed briefs for respondents in both cases.†

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†Briefs of *amici curiae* urging reversal in No. 17–1717 were filed for CatholicVote.org Education Fund by *Scott W. Gaylord*; for the Foundation for Moral Law by *John Eidsmoe*; and for Public Advocate of the United States et al. by *Herbert W. Titus*, *William J. Olson*, *Jeremiah L. Morgan*, *Joseph W. Miller*, and *J. Mark Brewer*.

A brief of *amicus curiae* urging reversal in No. 18–18 was filed for the State of Maryland by *Brian E. Frosh*, Attorney General of Maryland, and *John R. Grimm*, Assistant Attorney General.

Briefs of *amici curiae* urging reversal were filed in both cases for the State of West Virginia et al. by *Patrick Morrisey*, Attorney General of West Virginia, *Lindsay S. See*, Solicitor General, and *Zachary A. Viglianco*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Kevin G. Clarkson* of Alaska, *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas,

JUSTICE ALITO announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–B, II–C, III, and IV, and an opinion with respect to Parts II–A and II–D, in which THE CHIEF JUSTICE, JUSTICE BREYER, and JUSTICE KAVANAUGH join.

Since 1925, the Bladensburg Peace Cross (Cross) has stood as a tribute to 49 area soldiers who gave their lives in the

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Cynthia H. Coffman of Colorado, *Pamela J. Bondi* of Florida, *Christopher M. Carr* of Georgia, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Andy Beshear* of Kentucky, *Jeff Martin Landry* of Louisiana, *Bill Schuette* of Michigan, *Jim Hood* of Mississippi, *Josh Hawley* of Missouri, *Tim Fox* of Montana, *Doug Peterson* of Nebraska, *Wayne Stenehjem* of North Dakota, *Michael DeWine* of Ohio, *Mike Hunter* of Oklahoma, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Marty Jackley* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean Reyes* of Utah, *Mark R. Herring* of Virginia, *Brad Schimel* of Wisconsin, and *Peter K. Michael* of Wyoming; for Taos, New Mexico, by *R. Timothy McCrum* and *Elizabeth B. Dawson*; for American Association of Christian Schools et al. by *William Wagner*, *Erin Elizabeth Mersino*, and *Katherine L. Henry*; for American Center for Law & Justice et al. by *Jay Alan Sekulow*, *Stuart J. Roth*, *Walter M. Weber*, *Jordan Sekulow*, *Francis J. Manion*, *Geoffrey R. Surtees*, *Edward L. White III*, and *Erik M. Zimmerman*; for the American Civil Rights Union by *John J. Park, Jr.*; for the Becket Fund for Religious Liberty by *Michael W. McConnell*, *Luke W. Goodrich*, and *Eric C. Rassbach*; for the Cato Institute by *Ilya Shapiro*; for the Center for Constitutional Jurisprudence by *John C. Eastman* and *Anthony T. Caso*; for the Citizens United Foundation et al. by *Matthew D. McGill* and *Michael Boos*; for Family Members of Soldiers Named on the Peace Cross by *Zachary G. Parks*; for the Family Research Council by *Travis Weber*; for the Islam & Religious Freedom Action Team of the Religious Freedom Institute by *Miles E. Coleman*; for the Jewish Coalition for Religious Liberty by *Daniel P. Kearney, Jr.*, and *Howard Slugh*; for Judicial Watch, Inc., by *Meredith L. Di Liberto* and *James F. Peterson*; for the Justice and Freedom Fund by *James L. Hirsen* and *Deborah J. Dewart*; for Liberty Council by *Mary E. McAlister*, *Matthew D. Staver*, *Anita L. Staver*, and *Horatio G. Mihet*; for Maryland Elected Officials et al. by *Thomas R. McCarthy* and *Jeffrey M. Harris*; for Medal of Honor Recipients by *Brian H. Pandya* and *Megan L. Brown*; for the Military Order of the Purple Heart by *Matthew J. Dowd* and *William R. Suhre*; for the National Association

First World War. Eighty-nine years after the dedication of the Cross, respondents filed this lawsuit, claiming that they are offended by the sight of the memorial on public land and that its presence there and the expenditure of public funds to maintain it violate the Establishment Clause of the First Amendment. To remedy this violation, they asked a federal

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of Counties et al. by *Paul J. Zidlicky*, *Lisa Soronen*, and *Charles W. Thompson, Jr.*; for the National Jewish Commission on Law and Public Affairs et al. by *Nathan Lewin*, *Alyza D. Lewin*, and *Dennis Rapps*; for Religious Denominations et al. by *Gene C. Schaerr*, *Erik S. Jaffe*, *Michael T. Worley*, *Alexander Dushku*, and *R. Shawn Gunnarson*; for Retired Generals et al. by *Aaron M. Streett* and *Edwin Meese III*; for The Rutherford Institute by *Michael J. Lockerby* and *John W. Whitehead*; for the Thomas More Law Center by *Erin J. Kuenzig* and *Richard F. Thompson*; for the Utah Highway Patrol Association by *Allyson N. Ho*, *Bradley G. Hubbard*, *Katherine C. Yarger*, and *Frank D. Mylar*; for Various Professors by *Stephen C. Piepgrass* and *Ryan J. Strasser*; for Veterans in Defense of Liberty et al. by *Frederick W. Claybrook, Jr.*, *Steven W. Fitschen*, and *James A. Davids*; for Veterans of Foreign Wars of the United States et al. by *Paul D. Clement* and *Erin E. Murphy*; for the Wisconsin Institute for Law & Liberty by *Richard M. Esenberg*; for Maj. Gen. Patrick Brady et al. by *H. Woodruff Turner*, *Kristen K. Waggoner*, *John J. Bursch*, *David A. Cortman*, *Jonathan A. Scruggs*, *Rory T. Gray*, *Brett B. Harvey*, and *Nathaniel Bruno*; for Walter Dellinger et al. by *Martin S. Lederman*; for Lieut. Col. Kamal S. Kalsi by *Tejinder Singh*; and for 84 U. S. Senators et al. by *Charles J. Cooper*, *David H. Thompson*, and *Haley N. Proctor*.

Briefs of *amici curiae* urging affirmance were filed in both cases for the Baptist Joint Committee for Religious Liberty et al. by *Douglas Laycock*, *K. Hollyn Hollman*, and *Jennifer L. Hawks*; for the Freedom From Religion Foundation et al. by *Robert M. Loeb* and *Gregory M. Lipper*; for Historians et al. by *Charles A. Rothfeld*, *Andrew J. Pincus*, *Paul W. Hughes*, *Michael B. Kimberly*, and *Steven K. Green*; for the Jewish War Veterans of the United States of America, Inc., by *Harvey Weiner*, *David A. Strauss*, *Sarah M. Konsky*, and *Matthew S. Hellman*; for Law Professors by *Christopher C. Lund*; for the Military Religious Freedom Foundation et al. by *Sarah M. Shalf*; for Muslim Advocates by *R. Stanton Jones*, *Andrew T. Tutt*, *Johnathan J. Smith*, and *Sirine Shebaya*; and for Religious and Civil-Rights Organizations by *Richard B. Katskee*, *Daniel Mach*, *Heather L. Weaver*, *Steven M. Freeman*, *Elliot M. Mincberg*, *Diane Laviolette*, *Deborah A. Jeon*, and *Jeffrey I. Pasek*.

court to order the relocation or demolition of the Cross or at least the removal of its arms. The Court of Appeals for the Fourth Circuit agreed that the memorial is unconstitutional and remanded for a determination of the proper remedy. We now reverse.

Although the cross has long been a preeminent Christian symbol, its use in the Bladensburg memorial has a special significance. After the First World War, the picture of row after row of plain white crosses marking the overseas graves of soldiers who had lost their lives in that horrible conflict was emblazoned on the minds of Americans at home, and the adoption of the cross as the Bladensburg memorial must be viewed in that historical context. For nearly a century, the Bladensburg Cross has expressed the community's grief at the loss of the young men who perished, its thanks for their sacrifice, and its dedication to the ideals for which they fought. It has become a prominent community landmark, and its removal or radical alteration at this date would be seen by many not as a neutral act but as the manifestation of "a hostility toward religion that has no place in our Establishment Clause traditions." *Van Orden* v. *Perry*, 545 U. S. 677, 704 (2005) (BREYER, J., concurring in judgment). And contrary to respondents' intimations, there is no evidence of discriminatory intent in the selection of the design of the memorial or the decision of a Maryland commission to maintain it. The Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously, and the presence of the Bladensburg Cross on the land where it has stood for so many years is fully consistent with that aim.

I

A

The cross came into widespread use as a symbol of Christianity by the fourth century,[1] and it retains that mean-

[1] B. Longenecker, The Cross Before Constantine: The Early Life of a Christian Symbol 2 (2015).

ing today. But there are many contexts in which the symbol has also taken on a secular meaning. Indeed, there are instances in which its message is now almost entirely secular.

A cross appears as part of many registered trademarks held by businesses and secular organizations, including Blue Cross Blue Shield, the Bayer Group, and some Johnson & Johnson products.[2] Many of these marks relate to health care, and it is likely that the association of the cross with healing had a religious origin. But the current use of these marks is indisputably secular.

The familiar symbol of the Red Cross—a red cross on a white background—shows how the meaning of a symbol that was originally religious can be transformed. The International Committee of the Red Cross (ICRC) selected that symbol in 1863 because it was thought to call to mind the flag of Switzerland, a country widely known for its neutrality.[3] The Swiss flag consists of a white cross on a red background. In an effort to invoke the message associated with that flag, the ICRC copied its design with the colors inverted. Thus, the ICRC selected this symbol for an essentially secular reason, and the current secular message of the symbol is shown by its use today in nations with only tiny Christian populations.[4] But the cross was originally chosen

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[2] See Blue Cross, Blue Shield, https://www.bcbs.com; The Bayer Group, The Bayer Cross—Logo and Landmark, https://www.bayer.com/en/logo-history.aspx; Band-Aid Brand Adhesive Bandages, Johnson & Johnson All Purpose First Aid Kit, https://www.band-aid.com/products/first-aid-kits/all-purpose (all Internet materials as last visited June 18, 2019).

[3] International Committee of the Red Cross, The History of the Emblems, https://www.icrc.org/en/doc/resources/documents/misc/emblem-history.htm.

[4] For example, the Indian and Japanese affiliates of the ICRC and Red Crescent Societies use the symbol of the cross. See Indian Red Cross Society, https://www.indianredcross.org/ircs/index.php; Japanese Red Cross Society, http://www.jrc.or.jp/english/.

for the Swiss flag for religious reasons.[5] So an image that began as an expression of faith was transformed.

The image used in the Bladensburg memorial—a plain Latin cross[6]—also took on new meaning after World War I. "During and immediately after the war, the army marked soldiers' graves with temporary wooden crosses or Stars of David"—a departure from the prior practice of marking graves in American military cemeteries with uniform rectangular slabs. G. Piehler, Remembering War the American Way 101 (1995); App. 1143. The vast majority of these grave markers consisted of crosses,[7] and thus when Americans saw photographs of these cemeteries, what struck them were rows and rows of plain white crosses. As a result, the image of a simple white cross "developed into a 'central symbol'" of the conflict. *Ibid.* Contemporary literature, poetry, and art reflected this powerful imagery. See Brief for Veterans of Foreign Wars of the United States et al. as *Amici Curiae* 10–16. Perhaps most famously, John Mc-

[5] See "Flag of Switzerland," Britannica Academic, https://academic.eb.com/levels/collegiate/article/flag-of-Switzerland/93966.

[6] The Latin form of the cross "has a longer upright than crossbar. The intersection of the two is usually such that the upper and the two horizontal arms are all of about equal length, but the lower arm is conspicuously longer." G. Ferguson, Signs & Symbols in Christian Art 294 (1954). See also Webster's Third New International Dictionary 1276 (1981) ("latin cross, n.": "a figure of a cross having a long upright shaft and a shorter crossbar traversing it above the middle").

[7] Of the roughly 116,000 casualties the United States suffered in World War I, some 3,500 were Jewish soldiers. J. Fredman & L. Falk, Jews in American Wars 100 (5th ed. 1954) (Fredman & Falk). In the congressional hearings involving the appropriate grave markers for those buried abroad, one Representative stated that approximately 1,600 of these Jewish soldiers were buried in overseas graves marked by Stars of David. See Hearings before the Committee on Military Affairs, 68th Cong., 1st Sess., 3 (1924). That would constitute about 5.2% of the 30,973 graves in American World War I cemeteries abroad. See American Battle Monuments Commission (ABMC), World War I Burials and Memorializations, https://www.abmc.gov/node/1273.

Crae's poem, In Flanders Fields, began with these memorable lines:

> "In Flanders fields the poppies blow
> Between the crosses, row on row."

In Flanders Fields and Other Poems 3 (G. P. Putnam's Sons ed. 1919). The poem was enormously popular. See P. Fussell, The Great War and Modern Memory 248–249 (1975). A 1921 New York Times article quoted a description of McCrae's composition as "'the poem of the army'" and "'of all those who understand the meaning of the great conflict.'"[8] The image of "the crosses, row on row," stuck in people's minds, and even today for those who view World War I cemeteries in Europe, the image is arresting.[9]

After the 1918 armistice, the War Department announced plans to replace the wooden crosses and Stars of David with uniform marble slabs like those previously used in American military cemeteries. App. 1146. But the public outcry against that proposal was swift and fierce. Many organizations, including the American War Mothers, a nonsectarian group founded in 1917, urged the Department to retain the design of the temporary markers. *Id.*, at 1146–1147. When the American Battle Monuments Commission took over the project of designing the headstones, it responded to this public sentiment by opting to replace the wooden crosses and Stars of David with marble versions of those symbols. *Id.*, at 1144. A Member of Congress likewise introduced a resolution noting that "these wooden symbols have, during and since the World War, been regarded as emblematic of the great sacrifices which that war entailed, have been so treated by poets and artists and have become peculiarly and inseparably associated in the thought of surviving relatives and comrades and of the Nation with these World War graves."

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[8] "In Flanders Fields," N. Y. Times, Dec. 18, 1921, p. 96.

[9] See ABMC, Cemeteries and Memorials, https://www.abmc.gov/cemeteries-memorials.

H. Res. 15, 68th Cong., 1 (1924); App. 1163–1164. This national debate and its outcome confirmed the cross's widespread resonance as a symbol of sacrifice in the war.

B

Recognition of the cross's symbolism extended to local communities across the country. In late 1918, residents of Prince George's County, Maryland, formed a committee for the purpose of erecting a memorial for the county's fallen soldiers. App. 988–989, 1014. Among the committee's members were the mothers of 10 deceased soldiers. *Id.*, at 989. The committee decided that the memorial should be a cross and hired sculptor and architect John Joseph Earley to design it. Although we do not know precisely why the committee chose the cross, it is unsurprising that the committee—and many others commemorating World War I[10]—adopted a symbol so widely associated with that wrenching event.

After selecting the design, the committee turned to the task of financing the project. The committee held fundraising events in the community and invited donations, no matter the size, with a form that read:

> "We, the citizens of Maryland, trusting in God, the Supreme Ruler of the Universe, Pledge Faith in our Brothers who gave their all in the World War to make [the] World Safe for Democracy. Their Mortal Bodies have turned to dust, but their spirit Lives to guide us through Life in the way of Godliness, Justice and Liberty.

[10] Other World War I memorials that incorporate the cross include the Argonne Cross and the Canadian Cross of Sacrifice in Arlington National Cemetery; the Wayside Cross in Towson, Maryland; the Wayside Cross in New Canaan, Connecticut; the Troop K Georgia Cavalry War Memorial Front in Augusta, Georgia; the Chestnut Hill and Mt. Airy World War Memorial in Philadelphia, Pennsylvania; and the Great War for Democracy Memorial in Waterbury, Connecticut.

> "With our Motto, 'One God, One Country, and One Flag' We contribute to this Memorial Cross Commemorating the Memory of those who have not Died in Vain." *Id.*, at 1251.

Many of those who responded were local residents who gave small amounts: Donations of 25 cents to 1 dollar were the most common. *Id.*, at 1014. Local businesses and political leaders assisted in this effort. *Id.*, at 1014, 1243. In writing to thank United States Senator John Walter Smith for his donation, committee treasurer Mrs. Martin Redman explained that "[t]he chief reason I feel as deeply in this matter [is that] my son, [Wm.] F. Redman, lost his life in France and because of that I feel that our memorial cross is, in a way, his grave stone." *Id.*, at 1244.

The Cross was to stand at the terminus of another World War I memorial—the National Defense Highway, which connects Washington to Annapolis. The community gathered for a joint groundbreaking ceremony for both memorials on September 28, 1919; the mother of the first Prince George's County resident killed in France broke ground for the Cross. *Id.*, at 910. By 1922, however, the committee had run out of funds, and progress on the Cross had stalled. The local post of the American Legion took over the project, and the monument was finished in 1925.

The completed monument is a 32-foot-tall Latin cross that sits on a large pedestal. The American Legion's emblem is displayed at its center, and the words "Valor," "Endurance," "Courage," and "Devotion" are inscribed at its base, one on each of the four faces. The pedestal also features a 9- by 2.5-foot bronze plaque explaining that the monument is "Dedicated to the heroes of Prince George's County, Maryland who lost their lives in the Great War for the liberty of the world." *Id.*, at 915 (capitalization omitted). The plaque lists the names of 49 local men, both Black and White, who died in the war. It identifies the dates of American involvement, and quotes President Woodrow Wilson's request for a

declaration of war: "'The right is more precious than peace. We shall fight for the things we have always carried nearest our hearts. To such a task we dedicate our lives.'" *Ibid.*

At the dedication ceremony, a local Catholic priest offered an invocation. *Id.*, at 217–218. United States Representative Stephen W. Gambrill delivered the keynote address, honoring the "'men of Prince George's County'" who "'fought for the sacred right of all to live in peace and security.'" *Id.*, at 1372. He encouraged the community to look to the "'token of this cross, symbolic of Calvary,'" to "'keep fresh the memory of our boys who died for a righteous cause.'" *Ibid.* The ceremony closed with a benediction offered by a Baptist pastor.

Since its dedication, the Cross has served as the site of patriotic events honoring veterans, including gatherings on Veterans Day, Memorial Day, and Independence Day. Like the dedication itself, these events have typically included an invocation, a keynote speaker, and a benediction. *Id.*, at 182, 319–323. Over the years, memorials honoring the veterans of other conflicts have been added to the surrounding area, which is now known as Veterans Memorial Park. These include a World War II Honor Scroll; a Pearl Harbor memorial; a Korea-Vietnam veterans memorial; a September 11 garden; a War of 1812 memorial; and two recently added 38-foot-tall markers depicting British and American soldiers in the Battle of Bladensburg. *Id.*, at 891–903, 1530. Because the Cross is located on a traffic island with limited space, the closest of these other monuments is about 200 feet away in a park across the road. *Id.*, at 36, 44.

As the area around the Cross developed, the monument came to be at the center of a busy intersection. In 1961, the Maryland-National Capital Park and Planning Commission (Commission) acquired the Cross and the land on which it sits in order to preserve the monument and address traffic-

safety concerns.[11] *Id.*, at 420–421, 1384–1387. The American Legion reserved the right to continue using the memorial to host a variety of ceremonies, including events in memory of departed veterans. *Id.*, at 1387. Over the next five decades, the Commission spent approximately $117,000 to maintain and preserve the monument. In 2008, it budgeted an additional $100,000 for renovations and repairs to the Cross.[12]

C

In 2012, nearly 90 years after the Cross was dedicated and more than 50 years after the Commission acquired it, the American Humanist Association (AHA) lodged a complaint with the Commission. The complaint alleged that the Cross's presence on public land and the Commission's maintenance of the memorial violate the Establishment Clause of

[11] There is some ambiguity as to whether the American Legion ever owned the land on which the Cross rests. When the Legion took over the Cross, the town of Bladensburg passed a resolution "assign[ing] and grant[ing] to the said Snyder-Farmer Post #3, American Legion, that parcel of ground upon which the cross now stands and that part necessary to complet[e] the park around said cross, to the perpetual care of the Snyder-Farmer Post #3 as long as it is in existence, and should the said Post go out of existence the plot to revert to the Town of Bladensburg, together with the cross and its surroundings." App. 65. In 1935, a statute authorized the State Roads Commission of Maryland to "investigate the ownership and possessory rights" of the tract surrounding the Cross and to "acquire the same by purchase or condemnation." *Id.*, at 421. It appears that in 1957, a court determined that it was necessary for the State to condemn the property. *Id.*, at 1377–1379. The State Roads Commission thereafter conveyed the property to the Commission in 1960. *Id.*, at 1380, 1382. To resolve any ambiguities, in 1961, the local American Legion post "transfer[ed] and assign[ed] to [the Commission] all its right, title and interest in and to the Peace Cross, also originally known as the Memorial Cross, and the tract upon which it is located." *Id.*, at 1387. At least by 1961, then, both the land and the Cross were publicly owned.

[12] Of the budgeted $100,000, the Commission had spent only $5,000 as of 2015. The Commission put off additional spending and repairs in light of this lawsuit. *Id.*, at 823.

the First Amendment. *Id.*, at 1443–1451. The AHA, along with three residents of Washington, D. C., and Maryland, also sued the Commission in the District Court for the District of Maryland, making the same claim. The AHA sought declaratory and injunctive relief requiring "removal or demolition of the Cross, or removal of the arms from the Cross to form a non-religious slab or obelisk." 874 F. 3d 195, 202, n. 7 (CA4 2017) (internal quotation marks omitted). The American Legion intervened to defend the Cross.

The District Court granted summary judgment for the Commission and the American Legion. The Cross, the District Court held, satisfies both the three-pronged test announced in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), and the analysis applied by JUSTICE BREYER in upholding the Ten Commandments monument at issue in *Van Orden* v. *Perry*, 545 U. S. 677. Under the *Lemon* test, a court must ask whether a challenged government action (1) has a secular purpose; (2) has a "principal or primary effect" that "neither advances nor inhibits religion"; and (3) does not foster "an excessive government entanglement with religion," 403 U. S., at 612–613 (internal quotation marks omitted). Applying that test, the District Court determined that the Commission had secular purposes for acquiring and maintaining the Cross—namely, to commemorate World War I and to ensure traffic safety. The court also found that a reasonable observer aware of the Cross's history, setting, and secular elements "would not view the Monument as having the effect of impermissibly endorsing religion." 147 F. Supp. 3d 373, 387 (Md. 2015). Nor, according to the court, did the Commission's maintenance of the memorial create the kind of "continued and repeated government involvement with religion" that would constitute an excessive entanglement. *Ibid.* (internal quotation marks omitted; emphasis deleted). Finally, in light of the factors that informed its analysis of *Lemon*'s "effects" prong, the court concluded that the Cross is

constitutional under JUSTICE BREYER's approach in *Van Orden*. 147 F. Supp. 3d, at 388–390.

A divided panel of the Court of Appeals for the Fourth Circuit reversed. The majority relied primarily on the *Lemon* test but also took cognizance of JUSTICE BREYER's *Van Orden* concurrence. While recognizing that the Commission acted for a secular purpose, the court held that the Bladensburg Cross failed *Lemon*'s "effects" prong because a reasonable observer would view the Commission's ownership and maintenance of the monument as an endorsement of Christianity. The court emphasized the cross's "inherent religious meaning" as the "'preeminent symbol of Christianity.'" 874 F. 3d, at 206–207. Although conceding that the monument had several "secular elements," the court asserted that they were "overshadow[ed]" by the Cross's size and Christian connection—especially because the Cross's location and condition would make it difficult for "passers-by" to "read" or otherwise "examine" the plaque and American Legion emblem. *Id.*, at 209–210. The court rejected as "too simplistic" an argument defending the Cross's constitutionality on the basis of its 90-year history, suggesting that "[p]erhaps the longer a violation persists, the greater the affront to those offended." *Id.*, at 208. In the alternative, the court concluded, the Commission had become excessively entangled with religion by keeping a display that "aggrandizes the Latin cross" and by spending more than *de minimis* public funds to maintain it. *Id.*, at 211–212.

Chief Judge Gregory dissented in relevant part, contending that the majority misapplied the "effects" test by failing to give adequate consideration to the Cross's "physical setting, history, and usage." *Id.*, at 218 (opinion concurring in part and dissenting in part). He also disputed the majority's excessive-entanglement analysis, noting that the Commission's maintenance of the Cross was not the kind of "comprehensive, discriminating, and continuing state sur-

veillance" of religion that *Lemon* was concerned to rule out. 874 F. 3d, at 221 (internal quotation marks omitted).

The Fourth Circuit denied rehearing en banc over dissents by Chief Judge Gregory, Judge Wilkinson, and Judge Niemeyer. 891 F. 3d 117 (2018). The Commission and the American Legion each petitioned for certiorari. We granted the petitions and consolidated them for argument. 586 U. S. 985 (2016).

II

A

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." While the concept of a formally established church is straightforward, pinning down the meaning of a "law respecting an establishment of religion" has proved to be a vexing problem. Prior to the Court's decision in *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947), the Establishment Clause was applied only to the Federal Government, and few cases involving this provision came before the Court. After *Everson* recognized the incorporation of the Clause, however, the Court faced a steady stream of difficult and controversial Establishment Clause issues, ranging from Bible reading and prayer in the public schools, *Engel* v. *Vitale*, 370 U. S. 421 (1962); *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203 (1963), to Sunday closing laws, *McGowan* v. *Maryland*, 366 U. S. 420 (1961), to state subsidies for church-related schools or the parents of students attending those schools, *Board of Ed. of Central School Dist. No. 1* v. *Allen*, 392 U. S. 236 (1968); *Everson*, *supra*. After grappling with such cases for more than 20 years, *Lemon* ambitiously attempted to distill from the Court's existing case law a test that would bring order and predictability to Establishment Clause decisionmaking. That test, as noted, called on courts to examine the purposes and effects of a challenged government action, as well as any

entanglement with religion that it might entail. *Lemon*, 403 U. S., at 612–613. The Court later elaborated that the "effect[s]" of a challenged action should be assessed by asking whether a "reasonable observer" would conclude that the action constituted an "endorsement" of religion. *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 592 (1989); *id.*, at 630 (O'Connor, J., concurring in part and concurring in judgment).

If the *Lemon* Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met. In many cases, this Court has either expressly declined to apply the test or has simply ignored it. See *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1 (1993); *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U. S. 687 (1994); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753 (1995); *Good News Club* v. *Milford Central School*, 533 U. S. 98 (2001); *Zelman* v. *Simmons-Harris*, 536 U. S. 639 (2002); *Cutter* v. *Wilkinson*, 544 U. S. 709 (2005); *Van Orden*, 545 U. S. 677; *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171 (2012); *Town of Greece* v. *Galloway*, 572 U. S. 565 (2014); *Trump* v. *Hawaii*, 585 U. S. 667 (2018).

This pattern is a testament to the *Lemon* test's shortcomings. As Establishment Clause cases involving a great array of laws and practices came to the Court, it became more and more apparent that the *Lemon* test could not resolve them. It could not "explain the Establishment Clause's tolerance, for example, of the prayers that open legislative meetings . . . ; certain references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins, decrees, and buildings; or the attention paid to the religious objectives of certain holidays, including Thanksgiving." *Van Orden*, *supra*, at 699 (opinion

of BREYER, J.). The test has been harshly criticized by Members of this Court,[13] lamented by lower court judges,[14] and questioned by a diverse roster of scholars.[15]

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[13] See, *e. g.*, *Utah Highway Patrol Assn.* v. *American Atheists, Inc.*, 565 U. S. 994, 995 (2011) (THOMAS, J., dissenting from denial of certiorari); *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 655–656 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 398–399 (1993) (Scalia, J., concurring in judgment); *Wallace* v. *Jaffree*, 472 U. S. 38, 112 (1985) (Rehnquist, J., dissenting).

[14] See, *e. g.*, *Green* v. *Haskell Cty. Bd. of Comm'rs*, 574 F. 3d 1235, n. 1 (CA10 2009) (Kelly, J., dissenting from denial of rehearing en banc) (discussing the "judicial morass resulting from the Supreme Court's opinions"); *Cooper* v. *United States Postal Service*, 577 F. 3d 479, 494 (CA2 2009) ("*Lemon* is difficult to apply and not a particularly useful test"); *Roark* v. *South Iron R–1 School Dist.*, 573 F. 3d 556, 563 (CA8 2009) ("[T]he *Lemon* test has had a 'checkered career' "); *Skoros* v. *New York*, 437 F. 3d 1, 15 (CA2 2006) (government officials "confront a 'jurisprudence of minutiae' that leaves them to rely on 'little more than intuition and a tape measure' to ensure the constitutionality of public holiday displays" (quoting *County of Allegheny*, *supra*, at 674–675 (opinion of Kennedy, J.))); *Felix* v. *Bloomfield*, 841 F. 3d 848, 864 (CA10 2016) (court "cannot speculate what precise actions a government must take" to comply with the Establishment Clause); *Separation of Church and State Comm.* v. *Eugene*, 93 F. 3d 617, 627 (CA9 1996) (O'Scannlain, J., concurring in result) (The standards announced by this Court "are not always clear, consistent or coherent").

[15] See McConnell, Religious Freedom at a Crossroads, 59 U. Chi. L. Rev. 115, 118–120 (1992) (describing doctrinal "chaos" *Lemon* created, allowing the Court to "reach almost any result in almost any case"); Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Colum. L. Rev. 1373, 1380–1388 (1981) (criticizing the "unstructured expansiveness of the entanglement notion" and the potential that certain constructions of the effects prong may result in "the establishment clause threaten[ing] to swallow the free exercise clause"); Smith, Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test, 86 Mich. L. Rev. 266, 269 (1987) (criticizing both the *Lemon* test and the endorsement gloss); Tushnet, Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses, 27 Wm. & Mary L. Rev. 997,

For at least four reasons, the *Lemon* test presents particularly daunting problems in cases, including the one now before us, that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations.[16] Together, these considerations counsel against efforts to evaluate such cases under *Lemon* and to-

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1004 (1986) (describing cases involving "'deeply ingrained practices'" as "not readily susceptible to analysis under the ordinary *Lemon* approach"); Choper, The Endorsement Test: Its Status and Desirability, 18 J. L. & Politics 499 (2002) (criticizing both *Lemon* and the endorsement gloss); Paulsen, Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication, 61 Notre Dame L. Rev. 311, 315 (1986) (criticizing the Court's reading of the Establishment Clause as "producing a schizophrenic pattern of decisions"); Marshall, "We Know It When We See It": The Supreme Court and Establishment, 59 S. Cal. L. Rev. 495, 526 (1986) (explaining that the purpose prong of *Lemon*, "[t]aken to its logical conclusion, . . . suggests that laws which respect free exercise rights . . . are unconstitutional").

[16] While we do not attempt to provide an authoritative taxonomy of the dozens of Establishment Clause cases that the Court has decided since *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947), most can be divided into six rough categories: (1) religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies, *e. g.*, *Lynch* v. *Donnelly*, 465 U. S. 668 (1984); *Van Orden* v. *Perry*, 545 U. S. 677 (2005); (2) religious accommodations and exemptions from generally applicable laws, *e. g.*, *Cutter* v. *Wilkinson*, 544 U. S. 709 (2005); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327 (1987); (3) subsidies and tax exemptions, *e. g.*, *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664 (1970); *Zelman* v. *Simmons-Harris*, 536 U. S. 639 (2002); (4) religious expression in public schools, *e. g.*, *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203 (1963); *Lee* v. *Weisman*, 505 U. S. 577 (1992); (5) regulation of private religious speech, *e. g.*, *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753 (1995); and (6) state interference with internal church affairs, *e. g.*, *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171 (2012). A final, miscellaneous category, including cases involving such issues as Sunday closing laws, see *McGowan* v. *Maryland*, 366 U. S. 420 (1961), and church involvement in governmental decisionmaking, see *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116 (1982); *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U. S. 687 (1994), might be added. We deal here with an issue that falls into the first category.

ward application of a presumption of constitutionality for longstanding monuments, symbols, and practices.

B

First, these cases often concern monuments, symbols, or practices that were first established long ago, and in such cases, identifying their original purpose or purposes may be especially difficult. In *Salazar* v. *Buono*, 559 U. S. 700 (2010), for example, we dealt with a cross that a small group of World War I veterans had put up at a remote spot in the Mojave Desert more than seven decades earlier. The record contained virtually no direct evidence regarding the specific motivations of these men. We knew that they had selected a plain white cross, and there was some evidence that the man who looked after the monument for many years—"a miner who had served as a medic and had thus presumably witnessed the carnage of the war firsthand"—was said not to have been "particularly religious." *Id.*, at 724 (ALITO, J., concurring in part and concurring in judgment).

Without better evidence about the purpose of the monument, different Justices drew different inferences. The plurality thought that this particular cross was meant "to commemorate American servicemen who had died in World War I" and was not intended "to promote a Christian message." *Id.*, at 715. The dissent, by contrast, "presume[d]" that the cross's purpose "was a Christian one, at least in part, for the simple reason that those who erected the cross chose to commemorate American veterans in an explicitly Christian manner." *Id.*, at 752 (opinion of Stevens, J.). The truth is that 70 years after the fact, there was no way to be certain about the motivations of the men who were responsible for the creation of the monument. And this is often the case with old monuments, symbols, and practices. Yet it would be inappropriate for courts to compel their removal or termination based on supposition.

Second, as time goes by, the purposes associated with an established monument, symbol, or practice often multiply. Take the example of Ten Commandments monuments, the subject we addressed in *Van Orden*, 545 U. S. 677, and *McCreary County* v. *American Civil Liberties Union of Ky.*, 545 U. S. 844 (2005). For believing Jews and Christians, the Ten Commandments are the word of God handed down to Moses on Mount Sinai, but the image of the Ten Commandments has also been used to convey other meanings. They have historical significance as one of the foundations of our legal system, and for largely that reason, they are depicted in the marble frieze in our courtroom and in other prominent public buildings in our Nation's capital. See *Van Orden*, *supra*, at 688–690. In *Van Orden* and *McCreary*, no Member of the Court thought that these depictions are unconstitutional. 545 U. S., at 688–690; *id.*, at 701 (opinion of BREYER, J.); *id.*, at 740 (Souter, J., dissenting).

Just as depictions of the Ten Commandments in these public buildings were intended to serve secular purposes, the litigation in *Van Orden* and *McCreary* showed that secular motivations played a part in the proliferation of Ten Commandments monuments in the 1950s. In 1946, Minnesota Judge E. J. Ruegemer proposed that the Ten Commandments be widely disseminated as a way of combating juvenile delinquency.[17] With this prompting, the Fraternal Order of the Eagles began distributing paper copies of the Ten Commandments to churches, school groups, courts, and government offices. The Eagles, "while interested in the religious aspect of the Ten Commandments, sought to highlight the Commandments' role in shaping civic morality." *Van Orden*, *supra*, at 701 (opinion of BREYER, J.). At the same time, Cecil B. DeMille was filming The Ten Command-

[17] See Bravin, When Moses' Laws Run Afoul of the U. S.'s, Get Me Cecil B. deMille—Ten Commandment Memorial Has Novel Defense in Suit, Wall Street Journal, Apr. 18, 2001, p. A1.

ments.[18] He learned of Judge Ruegemer's campaign, and the two collaborated, deciding that the Commandments should be carved on stone tablets and that DeMille would make arrangements with the Eagles to help pay for them, thus simultaneously promoting his film and public awareness of the Decalogue. Not only did DeMille and Judge Ruegemer have different purposes, but the motivations of those who accepted the monuments and those responsible for maintaining them may also have differed. As we noted in *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 476 (2009), "the thoughts or sentiments expressed by a government entity that accepts and displays [a monument] may be quite different from those of either its creator or its donor."

The existence of multiple purposes is not exclusive to long-standing monuments, symbols, or practices, but this phenomenon is more likely to occur in such cases. Even if the original purpose of a monument was infused with religion, the passage of time may obscure that sentiment. As our society becomes more and more religiously diverse, a community may preserve such monuments, symbols, and practices for the sake of their historical significance or their place in a common cultural heritage. Cf. *Schempp*, 374 U. S., at 264–265 (Brennan, J., concurring) ("[The] government may originally have decreed a Sunday day of rest for the impermissible purpose of supporting religion but abandoned that purpose and retained the laws for the permissible purpose of furthering overwhelmingly secular ends").

Third, just as the purpose for maintaining a monument, symbol, or practice may evolve, "[t]he 'message' conveyed . . . may change over time." *Summum*, 555 U. S., at 477. Consider, for example, the message of the Statue of Liberty, which began as a monument to the solidarity and friendship between France and the United States and only decades

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[18] See D. Davis, The Oxford Handbook of Church and State in the United States 284 (2010).

later came to be seen "as a beacon welcoming immigrants to a land of freedom." *Ibid.*

With sufficient time, religiously expressive monuments, symbols, and practices can become embedded features of a community's landscape and identity. The community may come to value them without necessarily embracing their religious roots. The recent tragic fire at Notre Dame in Paris provides a striking example. Although the French Republic rigorously enforces a secular public square,[19] the cathedral remains a symbol of national importance to the religious and nonreligious alike. Notre Dame is fundamentally a place of worship and retains great religious importance, but its meaning has broadened. For many, it is inextricably linked with the very idea of Paris and France.[20] Speaking to the nation shortly after the fire, President Macron said that Notre Dame " 'is our history, our literature, our imagination. The place where we survived epidemics, wars, liberation. It has been the epicenter of our lives.' "[21]

In the same way, consider the many cities and towns across the United States that bear religious names. Religion undoubtedly motivated those who named Bethlehem, Pennsylvania; Las Cruces, New Mexico; Providence, Rhode Island; Corpus Christi, Texas; Nephi, Utah, and the countless other places in our country with names that are rooted in religion. Yet few would argue that this history requires that these names be erased from the map. Or take a motto like Arizona's, "*Ditat Deus*" ("God enriches"), which was adopted in 1864,[22] or a flag like Maryland's, which has included two

[19] See French Const., Art. 1 (proclaiming that France is a "secular . . . Republic").

[20] See Erlanger, What the Notre-Dame Fire Reveals About the Soul of France, N. Y. Times, Apr. 16, 2019.

[21] Hinnant, Petrequin, & Ganley, Fire Ravages Soaring Notre Dame Cathedral, Paris Left Aghast, AP News, Apr. 16, 2019.

[22] See B. Shearer & B. Shearer, State Names, Seals, Flags, and Symbols: A Historical Guide 17–18 (3d ed. 2002). See also *id.*, at 18 (Connecticut motto: "*Qui Tanstulit Sustinet*" ("He Who Transplanted Still Sustains"),

crosses since 1904.[23] Familiarity itself can become a reason for preservation.

Fourth, when time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken on particular meaning. A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion. Militantly secular regimes have carried out such projects in the past,[24] and for those with a knowledge of history, the image of monuments being taken down will be evocative, disturbing, and divisive. Cf. *Van Orden*, 545 U. S., at 704 (opinion of BREYER, J.) ("[D]isputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation . . . could thereby create the very

dating back to the colonial era and adapted from the Book of Psalms 79:3); *ibid.* (Florida motto: "In God We Trust," adopted in 1868); *id.*, at 20 (Maryland motto: "*Scuto Bonae Volantatis Tuae Coronasti Nos*" ("With Favor Wilt Thou Compass Us as with a Shield"), which appeared on the seal adopted in 1876 and comes from Psalms 5:12); *id.*, at 21–22 (Ohio motto: "With God, All Things Are Possible," adopted in 1959 and taken from Matthew 19:26); *id.*, at 22 (South Dakota motto: "Under God the People Rule," adopted in 1885); *id.*, at 23 (American Samoa motto: "*Samoa—Muamua le Atua*" ("Samoa—Let God Be First"), adopted in 1975).

[23] The current flag was known and used since at least October 1880, and was officially adopted by the General Assembly in 1904. See History of the Maryland Flag, https://sos.maryland.gov/Pages/Services/Flag-History.aspx.

[24] For example, the French Revolution sought to "dechristianize" the nation and thus removed "plate[s], statues and other fittings from places of worship," destroyed "crosses, bells, shrines and other 'external signs of worship,'" and altered "personal and place names which had any ecclesiastical connotations to more suitably Revolutionary ones." Tallett, Dechristianizing France: The Year II and the Revolutionary Experience, in Religion, Society and Politics in France Since 1789, pp. 1–2 (F. Tallett & N. Atkin eds. 1991).

kind of religiously based divisiveness that the Establishment Clause seeks to avoid").

These four considerations show that retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones. The passage of time gives rise to a strong presumption of constitutionality.

C

The role of the cross in World War I memorials is illustrative of each of the four preceding considerations. Immediately following the war, "[c]ommunities across America built memorials to commemorate those who had served the nation in the struggle to make the world safe for democracy." G. Piehler, The American Memory of War, App. 1124. Although not all of these communities included a cross in their memorials, the cross had become a symbol closely linked to the war. "[T]he First World War witnessed a dramatic change in . . . the symbols used to commemorate th[e] service" of the fallen soldiers. *Id.*, at 1123. In the wake of the war, the United States adopted the cross as part of its military honors, establishing the Distinguished Service Cross and the Navy Cross in 1918 and 1919, respectively. See *id.*, at 147–148. And as already noted, the fallen soldiers' final resting places abroad were marked by white crosses or Stars of David. The solemn image of endless rows of white crosses became inextricably linked with and symbolic of the ultimate price paid by 116,000 soldiers. And this relationship between the cross and the war undoubtedly influenced the design of the many war memorials that sprang up across the Nation.

This is not to say that the cross's association with the war was the sole or dominant motivation for the inclusion of the symbol in every World War I memorial that features it. But today, it is all but impossible to tell whether that was so. The passage of time means that testimony from those actually involved in the decisionmaking process is generally un-

available, and attempting to uncover their motivations invites rampant speculation. And no matter what the original purposes for the erection of a monument, a community may wish to preserve it for very different reasons, such as the historic preservation and traffic-safety concerns the Commission has pressed here.

In addition, the passage of time may have altered the area surrounding a monument in ways that change its meaning and provide new reasons for its preservation. Such changes are relevant here, since the Bladensburg Cross now sits at a busy traffic intersection, and numerous additional monuments are located nearby.

Even the AHA recognizes that there are instances in which a war memorial in the form of a cross is unobjectionable. The AHA is not offended by the sight of the Argonne Cross or the Canadian Cross of Sacrifice, both Latin crosses commemorating World War I that rest on public grounds in Arlington National Cemetery. The difference, according to the AHA, is that their location in a cemetery gives them a closer association with individual gravestones and interred soldiers. See Brief for Respondents 96; Tr. of Oral Arg. 52.

But a memorial's placement in a cemetery is not necessary to create such a connection. The parents and other relatives of many of the war dead lacked the means to travel to Europe to visit their graves, and the bodies of approximately 4,400 American soldiers were either never found or never identified.[25] Thus, for many grieving relatives and friends, memorials took the place of gravestones. Recall that the mother of one of the young men memorialized by the Bladensburg Cross thought of the memorial as, "in a way, his grave stone." App. 1244. Whether in a cemetery or a city park, a World War I cross remains a memorial to the fallen.

Similar reasoning applies to other memorials and monuments honoring important figures in our Nation's history.

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[25] See App. 141, 936; M. Sledge, Soldier Dead 67 (2005).

When faith was important to the person whose life is commemorated, it is natural to include a symbolic reference to faith in the design of the memorial. For example, many memorials for Dr. Martin Luther King, Jr., make reference to his faith. Take the Martin Luther King, Jr. Civil Rights Memorial Park in Seattle, which contains a sculpture in three segments representing "both the Christian Trinity and the union of the family."[26] In Atlanta, the Ebenezer Baptist Church sits on the grounds of the Martin Luther King, Jr. National Historical Park. National Statuary Hall in the Capitol honors a variety of religious figures: for example, Mother Joseph Pariseau kneeling in prayer; Po'Pay, a Pueblo religious leader with symbols of the Pueblo religion; Brigham Young, president of the Church of Jesus Christ of Latter-day Saints; and Father Eusebio Kino with a crucifix around his neck and his hand raised in blessing.[27] These monuments honor men and women who have played an important role in the history of our country, and where religious symbols are included in the monuments, their presence acknowledges the centrality of faith to those whose lives are commemorated.

Finally, as World War I monuments have endured through the years and become a familiar part of the physical and cultural landscape, requiring their removal would not be viewed by many as a neutral act. And an alteration like the one entertained by the Fourth Circuit—amputating the arms of the Cross, see 874 F. 3d, at 202, n. 7—would be seen by many as profoundly disrespectful. One member of the majority below viewed this objection as inconsistent with the claim that the Bladensburg Cross serves secular purposes, see 891 F. 3d, at 121 (Wynn, J., concurring in denial of en banc), but this argument misunderstands the complexity of monuments.

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[26] Local Memorials Honoring Dr. King, https://www.kingcounty.gov/elected/executive/equity-social-justice/mlk/local-memorials.aspx.

[27] The National Statuary Hall Collection, https://www.aoc.gov/the-national-statuary-hall-collection.

A monument may express many purposes and convey many different messages, both secular and religious. Cf. *Van Orden*, 545 U. S., at 690 (plurality opinion) (describing simultaneous religious and secular meaning of the Ten Commandments display). Thus, a campaign to obliterate items with religious associations may evidence hostility to religion even if those religious associations are no longer in the forefront.

For example, few would say that the State of California is attempting to convey a religious message by retaining the names given to many of the State's cities by their original Spanish settlers—San Diego, Los Angeles, Santa Barbara, San Jose, San Francisco, etc. But it would be something else entirely if the State undertook to change all those names. Much the same is true about monuments to soldiers who sacrificed their lives for this country more than a century ago.

D

While the *Lemon* Court ambitiously attempted to find a grand unified theory of the Establishment Clause, in later cases, we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance. Our cases involving prayer before a legislative session are an example.

In *Marsh* v. *Chambers*, 463 U. S. 783 (1983), the Court upheld the Nebraska Legislature's practice of beginning each session with a prayer by an official chaplain, and in so holding, the Court conspicuously ignored *Lemon* and did not respond to Justice Brennan's argument in dissent that the legislature's practice could not satisfy the *Lemon* test. 463 U. S., at 797–801. Instead, the Court found it highly persuasive that Congress for more than 200 years had opened its sessions with a prayer and that many state legislatures had followed suit. *Id.*, at 787–788. We took a similar approach more recently in *Town of Greece*, 572 U. S., at 577.

We reached these results even though it was clear, as stressed by the *Marsh* dissent, that prayer is by definition

religious. See *Marsh*, *supra*, at 797–798 (opinion of Brennan, J.). As the Court put it in *Town of Greece*: "*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." 572 U. S., at 576. "The case teaches instead that the Establishment Clause must be interpreted 'by reference to historical practices and understandings'" and that the decision of the First Congress to "provid[e] for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society." *Ibid.*

The prevalence of this philosophy at the time of the founding is reflected in other prominent actions taken by the First Congress. It requested—and President Washington proclaimed—a national day of prayer, see 1 J. Richardson, Messages and Papers of the Presidents, 1789–1897, p. 64 (1897) (President Washington's Thanksgiving Proclamation), and it reenacted the Northwest Territory Ordinance, which provided that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged," 1 Stat. 52, n. (*a*). President Washington echoed this sentiment in his Farewell Address, calling religion and morality "indispensable supports" to "political prosperity." Farewell Address (1796), in 35 The Writings of George Washington 229 (J. Fitzpatrick ed. 1940). See also P. Hamburger, Separation of Church and State 66 (2002). The First Congress looked to these "supports" when it chose to begin its sessions with a prayer. This practice was designed to solemnize congressional meetings, unifying those in attendance as they pursued a common goal of good governance.

To achieve that purpose, legislative prayer needed to be inclusive rather than divisive, and that required a determined effort even in a society that was much more religiously homogeneous than ours today. Although the United

States at the time was overwhelmingly Christian and Protestant,[28] there was considerable friction between Protestant denominations. See M. Noll, America's God: From Jonathan Edwards to Abraham Lincoln 228 (2002). Thus, when an Episcopal clergyman was nominated as chaplain, some Congregationalist Members of Congress objected due to the "'diversity of religious sentiments represented in Congress.'" D. Davis, Religion and the Continental Congress 74 (2000). Nevertheless, Samuel Adams, a staunch Congregationalist, spoke in favor of the motion: "'I am no bigot. I can hear a prayer from a man of piety and virtue, who is at the same time a friend of his country.'" *Ibid.* Others agreed and the chaplain was appointed.

Over time, the members of the clergy invited to offer prayers at the opening of a session grew more and more diverse. For example, an 1856 study of Senate and House Chaplains since 1789 tallied 22 Methodists, 20 Presbyterians, 19 Episcopalians, 13 Baptists, 4 Congregationalists, 2 Roman Catholics, and 3 that were characterized as "miscellaneous."[29] Four years later, Rabbi Morris Raphall became the first rabbi to open Congress.[30] Since then, Congress has welcomed guest chaplains from a variety of faiths, including Islam, Hinduism, Buddhism, and Native American religions.[31]

In *Town of Greece*, which concerned prayer before a town council meeting, there was disagreement about the inclusiveness of the town's practice. Compare 572 U. S., at 585 (opinion of the Court) ("The town made reasonable efforts to identify all of the congregations located within its borders and

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[28] W. Hutchison, Religious Pluralism in America 20–21 (2003).

[29] A. Stokes, 3 Church and State in the United States 130 (1950).

[30] Korn, Rabbis, Prayers, and Legislatures, 23 Hebrew Union College Ann., pt. 2, pp. 95, 96 (1950).

[31] See Lund, The Congressional Chaplaincies, 17 Wm. & Mary Bill of Rights J. 1171, 1204–1205 (2009). See also 160 Cong. Rec. 3853 (2014) (prayer by the Dalai Lama).

represented that it would welcome a prayer by any minister or layman who wished to give one"), with *id.*, at 616 (KAGAN, J., dissenting) ("Greece's Board did nothing to recognize religious diversity"). But there was no disagreement that the Establishment Clause permits a nondiscriminatory practice of prayer at the beginning of a town council session. See *ibid.* ("I believe that pluralism and inclusion [in legislative prayer] in a town hall can satisfy the constitutional requirement of neutrality"). Of course, the specific practice challenged in *Town of Greece* lacked the very direct connection, via the First Congress, to the thinking of those who were responsible for framing the First Amendment. But what mattered was that the town's practice "fi[t] within the tradition long followed in Congress and the state legislatures." *Id.*, at 577 (opinion of the Court).

The practice begun by the First Congress stands out as an example of respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans. Where categories of monuments, symbols, and practices with a longstanding history follow in that tradition, they are likewise constitutional.

III

Applying these principles, we conclude that the Bladensburg Cross does not violate the Establishment Clause.

As we have explained, the Bladensburg Cross carries special significance in commemorating World War I. Due in large part to the image of the simple wooden crosses that originally marked the graves of American soldiers killed in the war, the cross became a symbol of their sacrifice, and the design of the Bladensburg Cross must be understood in light of that background. That the cross originated as a Christian symbol and retains that meaning in many contexts does not change the fact that the symbol took on an added secular meaning when used in World War I memorials.

Not only did the Bladensburg Cross begin with this meaning, but with the passage of time, it has acquired historical importance. It reminds the people of Bladensburg and surrounding areas of the deeds of their predecessors and of the sacrifices they made in a war fought in the name of democracy. As long as it is retained in its original place and form, it speaks as well of the community that erected the monument nearly a century ago and has maintained it ever since. The memorial represents what the relatives, friends, and neighbors of the fallen soldiers felt at the time and how they chose to express their sentiments. And the monument has acquired additional layers of historical meaning in subsequent years. The Cross now stands among memorials to veterans of later wars. It has become part of the community.

The monument would not serve that role if its design had deliberately disrespected area soldiers who perished in World War I. More than 3,500 Jewish soldiers gave their lives for the United States in that conflict,[32] and some have wondered whether the names of any Jewish soldiers from the area were deliberately left off the list on the memorial or whether the names of any Jewish soldiers were included on the Cross against the wishes of their families. There is no evidence that either thing was done, and we do know that one of the local American Legion leaders responsible for the Cross's construction was a Jewish veteran. See App. 65, 205, 990.

The AHA's brief strains to connect the Bladensburg Cross and even the American Legion with anti-Semitism and the Ku Klux Klan, see Brief for Respondents 5–7, but the AHA's disparaging intimations have no evidentiary support. And when the events surrounding the erection of the Cross are viewed in historical context, a very different picture may perhaps be discerned. The monument was dedicated on

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[32] Fredman & Falk 100–101.

July 12, 1925, during a period when the country was experiencing heightened racial and religious animosity. Membership in the Ku Klux Klan, which preached hatred of Blacks, Catholics, and Jews, was at its height.[33] On August 8, 1925, just two weeks after the dedication of the Bladensburg Cross and less than 10 miles away, some 30,000 robed Klansmen marched down Pennsylvania Avenue in the Nation's Capital. But the Bladensburg Cross memorial included the names of both Black and White soldiers who had given their lives in the war; and despite the fact that Catholics and Baptists at that time were not exactly in the habit of participating together in ecumenical services, the ceremony dedicating the Cross began with an invocation by a Catholic priest and ended with a benediction by a Baptist pastor. App. 1559–1569, 1373. We can never know for certain what was in the minds of those responsible for the memorial, but in light of what we know about this ceremony, we can perhaps make out a picture of a community that, at least for the moment, was united by grief and patriotism and rose above the divisions of the day.

Finally, it is surely relevant that the monument commemorates the death of particular individuals. It is natural and appropriate for those seeking to honor the deceased to invoke the symbols that signify what death meant for those who are memorialized. In some circumstances, the exclusion of any such recognition would make a memorial incomplete. This well explains why Holocaust memorials invariably include Stars of David or other symbols of Judaism.[34]

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[33] Fryer & Levitt, Hatred and Profits: Under the Hood of the Ku Klux Klan, 127 Q. J. Econ. 1883 (2012).

[34] For example, the South Carolina Holocaust Memorial depicts a large Star of David "'in sacred memory of the six million,'" see https://www.onecolumbiasc.com/public-art/south-carolina-holocaust-memorial/, and the Philadelphia Monument to Six Million Jewish Martyrs depicts a burning bush, Torah scrolls, and a blazing menorah, see https://www.associationforpublicart.org/artwork/monument-to-six-million-jewish-martyrs/.

It explains why a new memorial to Native American veterans in Washington, D. C., will portray a steel circle to represent "'the hole in the sky where the creator lives.'"[35] And this is why the memorial for soldiers from the Bladensburg community features the cross—the same symbol that marks the graves of so many of their comrades near the battlefields where they fell.

IV

The cross is undoubtedly a Christian symbol, but that fact should not blind us to everything else that the Bladensburg Cross has come to represent. For some, that monument is a symbolic resting place for ancestors who never returned home. For others, it is a place for the community to gather and honor all veterans and their sacrifices for our Nation. For others still, it is a historical landmark. For many of these people, destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment. For all these reasons, the Cross does not offend the Constitution.

* * *

We reverse the judgment of the Court of Appeals for the Fourth Circuit and remand the cases for further proceedings.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE KAGAN joins, concurring.

I have long maintained that there is no single formula for resolving Establishment Clause challenges. See *Van Orden* v. *Perry*, 545 U. S. 677, 698 (2005) (opinion concurring in judgment). The Court must instead consider each case in light

[35] Hedgpeth, "A Very Deep Kind of Patriotism": Memorial To Honor Native American Veterans Is Coming to the Mall, Washington Post, Mar. 31, 2019.

of the basic purposes that the Religion Clauses were meant to serve: assuring religious liberty and tolerance for all, avoiding religiously based social conflict, and maintaining that separation of church and state that allows each to flourish in its "separate spher[e]." *Ibid.*; see also *Zelman* v. *Simmons-Harris*, 536 U. S. 639, 717–723 (2002) (BREYER, J., dissenting).

I agree with the Court that allowing the State of Maryland to display and maintain the Peace Cross poses no threat to those ends. The Court's opinion eloquently explains why that is so: The Latin cross is uniquely associated with the fallen soldiers of World War I; the organizers of the Peace Cross acted with the undeniably secular motive of commemorating local soldiers; no evidence suggests that they sought to disparage or exclude any religious group; the secular values inscribed on the Cross and its place among other memorials strengthen its message of patriotism and commemoration; and, finally, the Cross has stood on the same land for 94 years, generating no controversy in the community until this lawsuit was filed. Nothing in the record suggests that the lack of public outcry "was due to a climate of intimidation." *Van Orden*, 545 U. S., at 702 (BREYER, J., concurring in judgment). In light of all these circumstances, the Peace Cross cannot reasonably be understood as "a government effort to favor a particular religious sect" or to "promote religion over nonreligion." *Ibid.* And, as the Court explains, ordering its removal or alteration at this late date would signal "a hostility toward religion that has no place in our Establishment Clause traditions." *Id.*, at 704.

The case would be different, in my view, if there were evidence that the organizers had "deliberately disrespected" members of minority faiths or if the Cross had been erected only recently, rather than in the aftermath of World War I. See *ante*, at 64; see also *Van Orden*, 545 U. S., at 703 (opinion of BREYER, J.) (explaining that, in light of the greater religious diversity today, "a more contemporary state effort" to

put up a religious display is "likely to prove divisive in a way that [a] longstanding, pre-existing monument [would] not"). But those are not the circumstances presented to us here, and I see no reason to order *this* cross torn down simply because *other* crosses would raise constitutional concerns.

Nor do I understand the Court's opinion today to adopt a "history and tradition test" that would permit any newly constructed religious memorial on public land. See *post*, this page and 71 (KAVANAUGH, J., concurring); cf. *post*, at 85–87 (GORSUCH, J., concurring in judgment). The Court appropriately "looks to history for guidance," *ante*, at 60 (plurality opinion), but it upholds the constitutionality of the Peace Cross only after considering its particular historical context and its long-held place in the community, see *ante*, at 63–66 (majority opinion). A newer memorial, erected under different circumstances, would not necessarily be permissible under this approach. Cf. *ante*, at 57.

As I have previously explained, "where the Establishment Clause is at issue," the Court must "'distinguish between real threat and mere shadow.'" *Van Orden*, 545 U. S., at 704 (opinion concurring in judgment) (quoting *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 308 (1963) (Goldberg, J., concurring)). In light of all the circumstances here, I agree with the Court that the Peace Cross poses no real threat to the values that the Establishment Clause serves.

JUSTICE KAVANAUGH, concurring.

I join the Court's eloquent and persuasive opinion in full. I write separately to emphasize two points.

I

Consistent with the Court's case law, the Court today applies a history and tradition test in examining and upholding the constitutionality of the Bladensburg Cross. See *Marsh* v. *Chambers*, 463 U. S. 783, 787–792, 795 (1983); *Van Orden*

v. *Perry*, 545 U. S. 677, 686–690 (2005) (plurality opinion); *Town of Greece* v. *Galloway*, 572 U. S. 565, 575–578 (2014).

As this case again demonstrates, this Court no longer applies the old test articulated in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971). The *Lemon* test examined, among other things, whether the challenged government action had a primary effect of advancing or endorsing religion. If *Lemon* guided this Court's understanding of the Establishment Clause, then many of the Court's Establishment Clause cases over the last 48 years would have been decided differently, as I will explain.

The opinion identifies five relevant categories of Establishment Clause cases: (1) religious symbols on government property and religious speech at government events; (2) religious accommodations and exemptions from generally applicable laws; (3) government benefits and tax exemptions for religious organizations; (4) religious expression in public schools; and (5) regulation of private religious speech in public forums. See *ante*, at 51, n. 16.

The *Lemon* test does not explain the Court's decisions in any of those five categories.

In the first category of cases, the Court has relied on history and tradition and upheld various religious symbols on government property and religious speech at government events. See, *e. g.*, *Marsh*, 463 U. S., at 787–792, 795; *Van Orden*, 545 U. S., at 686–690 (plurality opinion); *Town of Greece*, 572 U. S., at 575–578. The Court does so again today. *Lemon* does not account for the results in these cases.

In the second category of cases, this Court has allowed legislative accommodations for religious activity and upheld legislatively granted religious exemptions from generally applicable laws. See, *e. g.*, *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327 (1987); *Cutter* v. *Wilkinson*, 544 U. S. 709 (2005). But accommodations and exemptions "by definition" have

the effect of advancing or endorsing religion to some extent. *Amos*, 483 U. S., at 347 (O'Connor, J., concurring in judgment) (quotation altered). *Lemon*, fairly applied, does not justify those decisions.

In the third category of cases, the Court likewise has upheld government benefits and tax exemptions that go to religious organizations, even though those policies have the effect of advancing or endorsing religion. See, *e. g.*, *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664 (1970); *Mueller* v. *Allen*, 463 U. S. 388 (1983); *Mitchell* v. *Helms*, 530 U. S. 793 (2000) (plurality opinion); *Zelman* v. *Simmons-Harris*, 536 U. S. 639 (2002); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. 449 (2017). Those outcomes are not easily reconciled with *Lemon*.

In the fourth category of cases, the Court has proscribed government-sponsored prayer in public schools. The Court has done so not because of *Lemon*, but because the Court concluded that government-sponsored prayer in public schools posed a risk of coercion of students. The Court's most prominent modern case on that subject, *Lee* v. *Weisman*, 505 U. S. 577 (1992), did not rely on *Lemon*. In short, *Lemon* was not necessary to the Court's decisions holding government-sponsored school prayers unconstitutional.

In the fifth category, the Court has allowed private religious speech in public forums on an equal basis with secular speech. See, *e. g.*, *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993); *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753 (1995); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Good News Club* v. *Milford Central School*, 533 U. S. 98 (2001). That practice does not violate the Establishment Clause, the Court has ruled. *Lemon* does not explain those cases.

Today, the Court declines to apply *Lemon* in a case in the religious symbols and religious speech category, just as the Court declined to apply *Lemon* in *Town of Greece* v. *Gallo-*

way, *Van Orden* v. *Perry*, and *Marsh* v. *Chambers*. The Court's decision in this case again makes clear that the *Lemon* test does not apply to Establishment Clause cases in that category. And the Court's decisions over the span of several decades demonstrate that the *Lemon* test is not good law and does not apply to Establishment Clause cases in any of the five categories.

On the contrary, each category of Establishment Clause cases has its own principles based on history, tradition, and precedent. And the cases together lead to an overarching set of principles: If the challenged government practice is not coercive *and* if it (i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law, then there ordinarily is no Establishment Clause violation.*

The practice of displaying religious memorials, particularly religious war memorials, on public land is not coercive and is rooted in history and tradition. The Bladensburg Cross does not violate the Establishment Clause. Cf. *Town of Greece*, 572 U. S. 565.

II

The Bladensburg Cross commemorates soldiers who gave their lives for America in World War I. I agree with the Court that the Bladensburg Cross is constitutional. At the same time, I have deep respect for the plaintiffs' sincere objections to seeing the cross on public land. I have great respect for the Jewish war veterans who in an *amicus* brief say that the cross on public land sends a message of exclusion. I recognize their sense of distress and alienation. Moreover, I fully understand the deeply religious nature of

*That is not to say that challenged government actions outside that safe harbor are unconstitutional. Any such cases must be analyzed under the relevant Establishment Clause principles and precedents.

the cross. It would demean both believers and nonbelievers to say that the cross is not religious, or not all that religious. A case like this is difficult because it represents a clash of genuine and important interests. Applying our precedents, we uphold the constitutionality of the cross. In doing so, it is appropriate to also restate this bedrock constitutional principle: All citizens are equally American, no matter what religion they are, or if they have no religion at all.

The conclusion that the cross does not violate the Establishment Clause does not necessarily mean that those who object to it have no other recourse. The Court's ruling *allows* the State to maintain the cross on public land. The Court's ruling does not *require* the State to maintain the cross on public land. The Maryland Legislature could enact new laws requiring removal of the cross or transfer of the land. The Maryland Governor or other state or local executive officers may have authority to do so under current Maryland law. And if not, the legislature could enact new laws to authorize such executive action. The Maryland Constitution, as interpreted by the Maryland Court of Appeals, may speak to this question. And if not, the people of Maryland can amend the State Constitution.

Those alternative avenues of relief illustrate a fundamental feature of our constitutional structure: This Court is not the *only* guardian of individual rights in America. This Court fiercely protects the individual rights secured by the U. S. Constitution. See, *e. g.*, *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943); *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972). But the Constitution sets a floor for the protection of individual rights. The constitutional floor is sturdy and often high, but it is a floor. Other federal, state, and local government entities generally possess authority to safeguard individual rights above and beyond the rights secured by the U. S. Constitution. See generally J. Sutton, 51 Imperfect Solutions (2018); Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977).

JUSTICE KAGAN, concurring in part.

I fully agree with the Court's reasons for allowing the Bladensburg Peace Cross to remain as it is, and so join Parts I, II–B, II–C, III, and IV of its opinion, as well as JUSTICE BREYER's concurrence. Although I agree that rigid application of the *Lemon* test does not solve every Establishment Clause problem, I think that test's focus on purposes and effects is crucial in evaluating government action in this sphere—as this very suit shows. I therefore do not join Part II–A. I do not join Part II–D out of perhaps an excess of caution. Although I too "look[ ] to history for guidance," *ante,* at 60 (plurality opinion), I prefer at least for now to do so case-by-case, rather than to sign on to any broader statements about history's role in Establishment Clause analysis. But I find much to admire in this section of the opinion—particularly, its emphasis on whether longstanding monuments, symbols, and practices reflect "respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans." *Ante,* at 63. Here, as elsewhere, the opinion shows sensitivity to and respect for this Nation's pluralism, and the values of neutrality and inclusion that the First Amendment demands.

JUSTICE THOMAS, concurring in the judgment.

The Establishment Clause states that "Congress shall make no law respecting an establishment of religion." U. S. Const., Amdt. 1. The text and history of this Clause suggest that it should not be incorporated against the States. Even if the Clause expresses an individual right enforceable against the States, it is limited by its text to "law[s]" enacted by a legislature, so it is unclear whether the Bladensburg Cross would implicate any incorporated right. And even if it did, this religious display does not involve the type of actual legal coercion that was a hallmark of historical

establishments of religion. Therefore, the Cross is clearly constitutional.

I

As I have explained elsewhere, the Establishment Clause resists incorporation against the States. *Town of Greece* v. *Galloway*, 572 U. S. 565, 604–607 (2014) (opinion concurring in part and concurring in judgment); *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 49–51 (2004) (opinion concurring in judgment); *Van Orden* v. *Perry*, 545 U. S. 677, 692–693 (2005) (concurring opinion); *Zelman* v. *Simmons-Harris*, 536 U. S. 639, 677–680 (2002) (same). In *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 15 (1947), the Court "casually" incorporated the Clause with a declaration that because the Free Exercise Clause had been incorporated, "'[t]here is every reason to give the same application and broad interpretation to the "establishment of religion" clause.'" *Town of Greece*, 572 U. S., at 607, n. 1 (opinion of THOMAS, J.). The Court apparently did not consider that an incorporated Establishment Clause would prohibit exactly what the text of the Clause seeks to protect: state establishments of religion. See *id.*, at 605–606.

The Court's "inattention" to the significant question of incorporation "might be explained, although not excused, by the rise of popular conceptions about 'separation of church and state' as an 'American' constitutional right." *Id.*, at 608, n. 1; see P. Hamburger, Separation of Church and State 454–463 (2002); see also *id.*, at 391–454 (tracing the role of nativist sentiment in the rise of "the modern myth of separation" as an American ideal). But an ahistorical generalization is no substitute for careful constitutional analysis. We should consider whether any longstanding right of citizenship restrains the States in the establishment context. See generally *McDonald* v. *Chicago*, 561 U. S. 742, 805–858, and n. 20 (2010) (THOMAS, J., concurring in part and concurring in judgment).

Further confounding the incorporation question is the fact that the First Amendment by its terms applies only to "law[s]" enacted by "Congress." Obviously, a memorial is not a law. And respondents have not identified any specific law they challenge as unconstitutional, either on its face or as applied. Thus, respondents could prevail on their establishment claim only if the prohibition embodied in the Establishment Clause was understood to be an individual right of citizenship that applied to more than just "law[s]" "ma[de]" by "Congress."[1]

II

Even if the Clause applied to state and local governments in some fashion, "[t]he mere presence of the monument along [respondents'] path involves no coercion and thus does not violate the Establishment Clause." *Van Orden*, 545 U. S., at 694 (opinion of THOMAS, J.). The *sine qua non* of an establishment of religion is "'actual legal coercion.'" *Id.*, at 693. At the footing, "[t]he coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty." *Lee* v. *Weisman*, 505 U. S. 577, 640 (1992) (Scalia, J., dissenting) (emphasis deleted). "In a typical case, attendance at the established church was mandatory, and taxes were levied to generate church revenue. Dissenting ministers were barred from preaching, and political participation was limited to members of the established church." *Town of Greece*, *supra*, at 608 (opinion of THOMAS, J.) (citation omitted). In an action claiming an unconstitutional establishment of religion, the plaintiff must demonstrate that he was actually coerced by government conduct that shares

[1] In my view, the original meaning of the phrase "Congress shall make no law" is a question worth exploring. Compare G. Lawson & G. Seidman, The Constitution of Empire 42 (2004) (arguing that the First Amendment "applies only to Congress"), with *Shrum* v. *Coweta*, 449 F. 3d 1132, 1140–1143 (CA10 2006) (McConnell, J.) (arguing that it is not so limited).

the characteristics of an establishment as understood at the founding.[2]

Here, respondents briefly suggest that the government's spending their tax dollars on maintaining the Bladensburg Cross represents coercion, but they have not demonstrated that maintaining a religious display on public property shares any of the historical characteristics of an establishment of religion. The local commission has not attempted to control religious doctrine or personnel, compel religious observance, single out a particular religious denomination for exclusive state subsidization, or punish dissenting worship. Instead, the commission has done something that the founding generation, as well as the generation that ratified the Fourteenth Amendment, would have found commonplace: displaying a religious symbol on government property. See Brief for Becket Fund for Religious Liberty as *Amicus Curiae* 14–22. Lacking any characteristics of "the coercive state establishments that existed at the founding," *Town of Greece*, 572 U. S., at 608 (opinion of THOMAS, J.), the Bladensburg Cross is constitutional.

The Bladensburg Cross is constitutional even though the cross has religious significance as a central symbol of Christianity. Respondents' primary contention is that this characteristic of the Cross makes it "sectarian"—a word used in respondents' brief more than 40 times. Putting aside the fact that Christianity is not a "sect," religious displays or speech need not be limited to that which a "judge considers to be nonsectarian." *Id.*, at 582 (majority opinion). As the Court has explained, "[a]n insistence on nonsectarian" reli-

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[2] Of course, cases involving state or local action are not strictly speaking Establishment Clause cases, but instead Fourteenth Amendment cases about a privilege or immunity of citizenship. It is conceivable that the salient characteristics of an establishment changed by the time of the Fourteenth Amendment, see *Town of Greece* v. *Galloway*, 572 U. S. 565, 607, 609–610 (2014) (THOMAS, J., concurring in part and concurring in judgment), but respondents have presented no evidence suggesting so.

gious speech is inconsistent with our Nation's history and traditions. *Id.*, at 578–580; see *id.*, at 595 (ALITO, J., concurring). Moreover, requiring that religious expressions be nonsectarian would force the courts "to act as supervisors and censors of religious speech." *Id.*, at 581 (majority opinion). Any such effort would find courts "trolling through . . . religious beliefs" to decide what speech is sufficiently generic. *Mitchell* v. *Helms*, 530 U. S. 793, 828 (2000) (plurality opinion). And government bodies trying to comply with the inevitably arbitrary decisions of the courts would face similarly intractable questions. See *Town of Greece*, *supra*, at 596 (opinion of ALITO, J.).[3]

[3] Another reason to avoid a constitutional test that turns on the "sectarian" nature of religious speech is that the Court has suggested "formally dispens[ing]" with this factor in related contexts. *Mitchell*, 530 U. S., at 826 (plurality opinion). Among other reasons, the "sectarian" test "has a shameful pedigree" that originated during the 1870s when Congress considered the Blaine Amendment, "which would have amended the Constitution to bar any aid to sectarian institutions." *Id.*, at 828. "Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'" *Ibid.* This anti-Catholic hostility may well have played a role in the Court's later decisions. *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947), for example, was written by Justice Black, who would later accuse Catholics who advocated for textbook loans to religious schools of being "powerful sectarian religious propagandists . . . looking toward complete domination and supremacy of their particular brand of religion." *Board of Ed. of Central School Dist. No. 1* v. *Allen*, 392 U. S. 236, 251 (1968) (Black, J., dissenting). Even by the time of *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), some Justices were still "influenced by residual anti-Catholicism and by a deep suspicion of Catholic schools." Laycock, The Underlying Unity of Separation and Neutrality, 46 Emory L. J. 43, 58 (1997). Indeed, the Court's opinion in *Lemon* "relied on what it considered to be inherent risks in religious schools despite the absence of a record in *Lemon* itself and despite contrary fact-finding by the district court in the companion case." Laycock, *supra*, at 58 (footnote omitted); see generally W. Ball, Mere Creatures of the State?, 35–40 (1994). And in his concurring opinion, Justice Douglas (joined by Justice Black) repeatedly quoted an anti-Catholic book, including for the proposition that, in Catholic parochial schools, "'[t]he whole education of the child

III

As to the long-discredited test set forth in *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971), and reiterated in *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 592–594 (1989), the plurality rightly rejects its relevance to claims, like this one, involving "religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies." *Ante*, at 51, and n. 16. I agree with that aspect of its opinion. I would take the logical next step and overrule the *Lemon* test in all contexts. First, that test has no basis in the original meaning of the Constitution. Second, "since its inception," it has "been manipulated to fit whatever result the Court aimed to achieve." *McCreary County* v. *American Civil Liberties Union of Ky.*, 545 U. S. 844, 900 (2005) (Scalia, J., dissenting); see *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 398–399 (1993) (Scalia, J., concurring in judgment). Third, it continues to cause enormous confusion in the States and the lower courts. See generally *Utah Highway Patrol Assn.* v. *American Atheists, Inc.*, 565 U. S. 994 (2011) (THOMAS, J., dissenting from denial of certiorari). In recent decades, the Court has tellingly refused to apply *Lemon* in the very cases where it purports to be most useful. See *Utah Highway*, *supra*, at 997–998 (collecting cases); *ante*, at 49 (plurality opinion) (same). The obvious explanation is that *Lemon* does not provide a sound basis for judging Establishment Clause claims. However, the court below "s[aw] fit to apply *Lemon*." 874 F. 3d 195,

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is filled with propaganda.'" 403 U. S., at 635, n. 20 (quoting L. Boettner, Roman Catholicism 360 (1962)); see 403 U. S., at 636. The tract said that Hitler, Mussolini, and Stalin learned the "secret[s] of [their] success" in indoctrination from the Catholic Church, and that "an undue proportion of the gangsters, racketeers, thieves, and juvenile delinquents who roam our big city streets come . . . from the [Catholic] parochial schools," where children are taught by "brain-washed," "'ignorant European peasants.'" Boettner, *supra*, at 363, 370–372.

205 (CA4 2017). It is our job to say what the law is, and because the *Lemon* test is not good law, we ought to say so.

* * *

Regrettably, I cannot join the Court's opinion because it does not adequately clarify the appropriate standard for Establishment Clause cases. Therefore, I concur only in the judgment.

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring in the judgment.

The American Humanist Association wants a federal court to order the destruction of a 94-year-old war memorial because its members are offended. Today, the Court explains that the plaintiffs are not entitled to demand the destruction of longstanding monuments, and I find much of its opinion compelling. In my judgment, however, it follows from the Court's analysis that suits like this one should be dismissed for lack of standing. Accordingly, while I concur in the judgment to reverse and remand the court of appeals' decision, I would do so with additional instructions to dismiss the cases.

*

The Association claims that its members "regularly" come into "unwelcome direct contact" with a World War I memorial cross in Bladensburg, Maryland, "while driving in the area." 874 F. 3d 195, 203 (CA4 2017). And this, the Association suggests, is enough to allow it to insist on a federal judicial decree ordering the memorial's removal. Maybe, the Association concedes, others who are less offended lack standing to sue. Maybe others still who are equally affected but who come into contact with the memorial too infrequently lack standing as well. See Tr. of Oral Arg. 48–49. But, the Association assures us, its members are offended enough—and with sufficient frequency—that they may sue.

This "offended observer" theory of standing has no basis in law. Federal courts may decide only those cases and controversies that the Constitution and Congress have authorized them to hear. And to establish standing to sue consistent with the Constitution, a plaintiff must show: (1) injury-in-fact, (2) causation, and (3) redressability. The injury-in-fact test requires a plaintiff to prove "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992) (internal quotation marks omitted).

Unsurprisingly, this Court has already rejected the notion that offense alone qualifies as a "concrete and particularized" injury sufficient to confer standing. We could hardly have been clearer: "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." *Diamond* v. *Charles*, 476 U. S. 54, 62 (1986). Imagine if a bystander disturbed by a police stop tried to sue under the Fourth Amendment. Suppose an advocacy organization whose members were distressed by a State's decision to deny someone else a civil jury trial sought to complain under the Seventh Amendment. Or envision a religious group upset about the application of the death penalty trying to sue to stop it. Does anyone doubt those cases would be rapidly dispatched for lack of standing? Cf. *Whitmore* v. *Arkansas*, 495 U. S. 149, 151 (1990) (holding that a third party does not have "standing to challenge the validity of a death sentence imposed on a capital defendant who has elected to forgo his right of appeal").

It's not hard to see why this Court has refused suits like these. If individuals and groups could invoke the authority of a federal court to forbid what they dislike for no more reason than they dislike it, we would risk exceeding the Judiciary's limited constitutional mandate and infringing on powers committed to other branches of government. Courts would start to look more like legislatures, responding to so-

cial pressures rather than remedying concrete harms, in the process supplanting the right of the people and their elected representatives to govern themselves. See, *e. g.*, *Clapper* v. *Amnesty Int'l USA*, 568 U. S. 398, 408 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches"); *Warth* v. *Seldin*, 422 U. S. 490, 500 (1975) (without standing requirements "courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions"); *Hein* v. *Freedom From Religion Foundation, Inc.*, 551 U. S. 587, 635–636 (2007) (Scalia, J., concurring in judgment) ("'To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing "government by injunction"'").

Proceeding on these principles, this Court has held offense alone insufficient to convey standing in analogous—and arguably more sympathetic—circumstances. Take *Allen* v. *Wright*, 468 U. S. 737 (1984), where the parents of African-American schoolchildren sued to compel the Internal Revenue Service to deny tax-exempt status to schools that discriminated on the basis of race. The parents claimed that their children suffered a "stigmatic injury, or denigration" when the government supported racially discriminatory institutions. *Id.*, at 754. But this Court refused to entertain the case, reasoning that standing extends "only to those persons who are personally denied equal treatment by the challenged discriminatory conduct." *Id.*, at 755 (internal quotation marks omitted). Now put the teachings there alongside the Association's standing theory here and you get this utterly unjustifiable result: An African-American offended by

a Confederate flag atop a state capitol would lack standing to sue under the Equal Protection Clause, but an atheist who is offended by the cross on the same flag could sue under the Establishment Clause. Who really thinks *that* could be the law? See Brief for Becket Fund for Religious Liberty as *Amicus Curiae* 34–35.

Consider, as well, the Free Exercise Clause. In *Harris* v. *McRae*, 448 U. S. 297 (1980), this Court denied standing to a religious group that raised a free exercise challenge to federal restrictions on abortion funding because "the plaintiffs had 'not contended that the [statute in question] in any way coerce[d] them *as individuals* in the practice of their religion.'" *Id.*, at 321, n. 24. Instead, the Court has held, a free exercise plaintiff generally must "show that his good-faith religious beliefs are hampered before he acquires standing to attack a statute under the Free-Exercise Clause." *Braunfeld* v. *Brown*, 366 U. S. 599, 615 (1961) (Brennan, J., concurring and dissenting). And if standing doctrine has such bite under the Free Exercise Clause, it's difficult to see how it could be as toothless as plaintiffs suppose under the neighboring Establishment Clause.

In fact, this Court has already expressly rejected "offended observer" standing under the Establishment Clause itself. In *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464 (1982), the plaintiffs objected to a transfer of property from the federal government to a religious college, an action they had learned about through a news release. This Court had little trouble concluding that the plaintiffs lacked standing to challenge the transfer, explaining that "the psychological consequence presumably produced by observation of conduct with which one disagrees" is not an injury-in-fact "sufficient to confer standing under Art. III." *Id.*, at 485. To be sure, this Court has sometimes resolved Establishment Clause challenges to religious displays on the merits without first addressing standing. But as this Court has held, its own failure to consider standing cannot be mistaken

as an endorsement of it: "[D]rive-by jurisdictional rulings of this sort" carry "no precedential effect." *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 91 (1998).

Offended observer standing is deeply inconsistent, too, with many other longstanding principles and precedents. For example, this Court has consistently ruled that "'generalized grievances' about the conduct of Government" are insufficient to confer standing to sue. *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208, 217 (1974). But if offended observers could bring suit, this rule would be rendered meaningless: Who, after all, would have trouble recasting a generalized grievance about governmental action into an "I-take-offense" argument for standing? Similarly, this Court has long "adhered to the rule that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski* v. *Tesmer*, 543 U. S. 125, 129 (2004). We depart from this rule only where the party seeking to invoke the judicial power "has a 'close' relationship with the person who possesses the right" and "there is a 'hindrance' to the possessor's ability to protect his own interests." *Id.*, at 130. Applying these principles in *Kowalski*, this Court held that attorneys lacked standing to assert the rights of indigent defendants. *Id.*, at 127. And in *Whitmore*, we rejected a third party's effort to appeal another person's death sentence. 495 U. S., at 151. But if offended observers could sue, the attorneys in *Kowalski* might have simply claimed they were "offended" by Michigan's procedure for appointing appellate counsel, and the third party in *Whitmore* could have just said he was offended (as he surely was) by the impending execution. None of this Court's limits on third-party standing would really matter.

*

Offended observer standing cannot be squared with this Court's longstanding teachings about the limits of Article III. Not even today's dissent seriously attempts to defend

it. So at this point you might wonder: How *did* the lower courts in these cases indulge the plaintiffs' "offended observer" theory of standing? And why have other lower courts done similarly in other cases?

The truth is, the fault lies here. Lower courts invented offended observer standing for Establishment Clause cases in the 1970s in response to this Court's decision in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971). *Lemon* held that whether governmental action violates the Establishment Clause depends on its (1) purpose, (2) effect, and (3) potential to "'excessive[ly] . . . entangl[e]'" church and state, *id.*, at 613, a standard this Court came to understand as prohibiting the government from doing anything that a "'reasonable observer'" might perceive as "endorsing" religion, *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 620–621 (1989) (opinion of Blackmun, J.); *id.*, at 631 (O'Connor, J., concurring in part and concurring in judgment). And lower courts reasoned that, if the Establishment Clause forbids anything a reasonable observer would view as an endorsement of religion, then such an observer must be able to sue. *Moore* v. *Bryant*, 853 F. 3d 245, 250 (CA5 2017). Here alone, lower courts concluded, though never with this Court's approval, an observer's offense must "suffice to make an Establishment Clause claim justiciable." *Suhre* v. *Haywood Cty.*, 131 F. 3d 1083, 1086 (CA4 1997).

As today's plurality rightly indicates in Part II–A, however, *Lemon* was a misadventure. It sought a "grand unified theory" of the Establishment Clause but left us only a mess. See *ante*, at 60 (plurality opinion). How much "purpose" to promote religion is too much (are Sunday closing laws that bear multiple purposes, religious and secular, problematic)? How much "effect" of advancing religion is tolerable (are even incidental effects disallowed)? What does the "entanglement" test add to these inquiries? Even beyond all that, how "reasonable" must our "reasonable observer"

be, and what exactly qualifies as impermissible "endorsement" of religion in a country where "In God We Trust" appears on the coinage, the eye of God appears in its Great Seal, and we celebrate Thanksgiving as a national holiday ("to Whom are thanks being given")? *Harris* v. *Zion*, 927 F. 2d 1401, 1423 (CA7 1991) (Easterbrook, J., dissenting). Nearly half a century after *Lemon* and, the truth is, no one has any idea about the answers to these questions. As the plurality documents, our "doctrine [is] in such chaos" that lower courts have been "free to reach almost any result in almost any case." McConnell, Religious Participation in Public Programs: Religious Freedom at a Crossroads, 59 U. Chi. L. Rev. 115, 119 (1992). Scores of judges have pleaded with us to retire *Lemon*, scholars of all stripes have criticized the doctrine, and a majority of this Court has long done the same. *Ante*, at 50–51 (plurality opinion). Today, not a single Member of the Court even tries to defend *Lemon* against these criticisms—and they don't because they can't. As Justice Kennedy explained, *Lemon* is "flawed in its fundamentals," has proved "unworkable in practice," and is "inconsistent with our history and our precedents." *County of Allegheny*, 492 U. S., at 655, 669 (opinion concurring in judgment in part and dissenting in part).

In place of *Lemon*, Part II–D of the plurality opinion relies on a more modest, historically sensitive approach, recognizing that "the Establishment Clause must be interpreted by reference to historical practices and understandings." *Ante*, at 61 (quoting *Town of Greece* v. *Galloway*, 572 U. S. 565, 576 (2014) (internal quotation marks omitted); see also *ante*, at 68–71 (KAVANAUGH, J., concurring). So, by way of example, the plurality explains that a state legislature may permissibly begin each session with a prayer by an official chaplain because "Congress for more than 200 years had opened its sessions with a prayer and . . . many state legislatures had followed suit." *Ante*, at 60 (discussing *Marsh* v. *Chambers*, 463 U. S. 783 (1983), and *Town of Greece*, 572 U. S.

565). The constitutionality of a practice doesn't depend on some artificial and indeterminate three-part test; what matters, the plurality reminds us, is whether the challenged practice fits "'within the tradition'" of this country. *Ante*, at 63 (citing *Town of Greece*, 572 U. S., at 577).

I agree with all this and don't doubt that the monument before us is constitutional in light of the Nation's traditions. But then the plurality continues on to suggest that "long-standing monuments, symbols, and practices" are "presumpt[ively]" constitutional. *Ante*, at 52. And about that, it's hard not to wonder: How old must a monument, symbol, or practice be to qualify for this new presumption? It seems 94 years is enough, but what about the Star of David monument erected in South Carolina in 2001 to commemorate victims of the Holocaust, or the cross that marines in California placed in 2004 to honor their comrades who fell during the War on Terror? And where exactly in the Constitution does this presumption come from? The plurality does not say, nor does it even explain what work its presumption does. To the contrary, the plurality proceeds to analyze the "presumptively" constitutional memorial in these cases for its consistency with "'historical practices and understandings'" under *Marsh* and *Town of Greece*—exactly the same approach that the plurality, quoting *Town of Greece*, recognizes "'must be'" used *whenever* we interpret the Establishment Clause. *Ante*, at 61; see also *ante*, at 69–71 (KAVANAUGH, J., concurring). Though the plurality does not say so in as many words, the message for our lower court colleagues seems unmistakable: Whether a monument, symbol, or practice is old or new, apply *Town of Greece*, not *Lemon*. Indeed, some of our colleagues recognize this implication and blanch at its prospect. See *ante*, at 68 (BREYER, J., concurring); *ante*, at 73 (KAGAN, J., concurring in part) (declining to join Parts II–A and II–D); *post*, at 89–90, n. 2 (GINSBURG, J., dissenting). But if that's the real message of the plurality's opinion, it seems to me exactly right—because what matters

when it comes to assessing a monument, symbol, or practice isn't its age but its compliance with ageless principles. The Constitution's meaning is fixed, not some good-for-this-day-only coupon, and a practice consistent with our Nation's traditions is just as permissible whether undertaken today or 94 years ago.

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With *Lemon* now shelved, little excuse will remain for the anomaly of offended observer standing, and the gaping hole it tore in standing doctrine in the courts of appeals should now begin to close. Nor does this development mean colorable Establishment Clause violations will lack for proper plaintiffs. By way of example only, a public school student compelled to recite a prayer will still have standing to sue. See *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 224, n. 9 (1963). So will persons denied public office because of their religious affiliations or lack of them. And so will those who are denied government benefits because they do not practice a favored religion or any at all. *Texas Monthly, Inc.* v. *Bullock*, 489 U. S. 1, 7–8 (1989) (plurality opinion). On top of all that, States remain free to supply other forms of relief consistent with their own laws and constitutions.

Abandoning offended observer standing will mean only a return to the usual demands of Article III, requiring a real controversy with real impact on real persons to make a federal case out of it. Along the way, this will bring with it the welcome side effect of rescuing the Federal Judiciary from the sordid business of having to pass aesthetic judgment, one by one, on every public display in this country for its perceived capacity to give offense. It's a business that has consumed volumes of the federal reports, invited erratic results, frustrated generations of judges, and fomented "the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden* v. *Perry*, 545 U. S. 677, 704 (2005) (BREYER, J., concurring in judgment). Courts

applying *Lemon*'s test have upheld Ten Commandment displays and demanded their removal; they have allowed memorial crosses and insisted that they be razed; they have permitted Christmas displays and pulled the plug on them; and they have pondered seemingly endlessly the inclusion of "In God We Trust" on currency or similar language in our Pledge of Allegiance. No one can predict the rulings—but one thing is certain: Between the challenged practices and the judicial decisions, just about everyone will wind up offended.

Nor have we yet come close to exhausting the potential sources of offense and federal litigation *Lemon* invited, for what about the display of the Ten Commandments on the frieze in our own courtroom or on the doors leading into it? Or the statues of Moses and the Apostle Paul next door in the Library of Congress? Or the depictions of the Ten Commandments found in the Justice Department and the National Archives? Or the crosses that can be found in the U. S. Capitol building? And all that just takes us mere steps from where we sit. In light of today's decision, we should be done with this business, and our lower court colleagues may dispose of cases like these on a motion to dismiss rather than enmeshing themselves for years in intractable disputes sure to generate more heat than light.

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In a large and diverse country, offense can be easily found. Really, most every governmental action probably offends *somebody.* No doubt, too, that offense can be sincere, sometimes well taken, even wise. But recourse for disagreement and offense does not lie in federal litigation. Instead, in a society that holds among its most cherished ambitions mutual respect, tolerance, self-rule, and democratic responsibility, an "offended viewer" may "avert his eyes," *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 212 (1975), or pursue a political solution. Today's decision represents a welcome step to-

ward restoring this Court's recognition of these truths, and I respectfully concur in the judgment.

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, dissenting.

An immense Latin cross stands on a traffic island at the center of a busy three-way intersection in Bladensburg, Maryland.[1] "[M]onumental, clear, and bold" by day, App. 914, the cross looms even larger illuminated against the night-time sky. Known as the Peace Cross, the monument was erected by private citizens in 1925 to honor local soldiers who lost their lives in World War I. "[T]he town's most prominent symbol" was rededicated in 1985 and is now said to honor "the sacrifices made [in] all wars," *id.*, at 868 (internal quotation marks omitted), by "all veterans," *id.*, at 195. Both the Peace Cross and the traffic island are owned and maintained by the Maryland-National Capital Park and Planning Commission (Commission), an agency of the State of Maryland.

Decades ago, this Court recognized that the Establishment Clause of the First Amendment to the Constitution demands governmental neutrality among religious faiths, and between religion and nonreligion. See *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 15 (1947). Numerous times since, the Court has reaffirmed the Constitution's commitment to neutrality. Today the Court erodes that neutrality commitment, diminishing precedent designed to preserve individual liberty and civic harmony in favor of a "presumption of constitutionality for longstanding monuments, symbols, and practices." *Ante*, at 52 (plurality opinion).[2]

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[1] A photograph of the monument and a map showing its location are reproduced in the Appendix, *infra*, at 105–106.

[2] Some of my colleagues suggest that the Court's new presumption extends to all governmental displays and practices, regardless of their age. See *ante*, at 70–71 (KAVANAUGH, J., concurring); *ante*, at 78 (THOMAS, J., con-

The Latin cross is the foremost symbol of the Christian faith, embodying the "central theological claim of Christianity: that the son of God died on the cross, that he rose from the dead, and that his death and resurrection offer the possibility of eternal life." Brief for Baptist Joint Committee for Religious Liberty et al. as *Amici Curiae* 7 (Brief for *Amici* Christian and Jewish Organizations). Precisely because the cross symbolizes these sectarian beliefs, it is a common marker for the graves of Christian soldiers. For the same reason, using the cross as a war memorial does not transform it into a secular symbol, as the Courts of Appeals have uniformly recognized. See *infra*, at 97–98, n. 10. Just as a Star of David is not suitable to honor Christians who died serving their country, so a cross is not suitable to honor those of other faiths who died defending their nation. Soldiers of all faiths "are united by their love of country, but they are not united by the cross." Brief for Jewish War Veterans of the United States of America, Inc., as *Amicus Curiae* 3 (Brief for *Amicus* Jewish War Veterans).

By maintaining the Peace Cross on a public highway, the Commission elevates Christianity over other faiths, and religion over nonreligion. Memorializing the service of American soldiers is an "admirable and unquestionably secular" objective. *Van Orden* v. *Perry*, 545 U. S. 677, 715 (2005) (Stevens, J., dissenting). But the Commission does not serve that objective by displaying a symbol that bears "a starkly sectarian message." *Salazar* v. *Buono*, 559 U. S. 700, 736 (2010) (Stevens, J., dissenting).

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curring in judgment); *ante*, at 86 (GORSUCH, J., concurring in judgment). But see *ante*, at 67–68 (BREYER, J., joined by KAGAN, J., concurring) (" '[A] more contemporary state effort' to put up a religious display is 'likely to prove divisive in a way that [a] longstanding, pre-existing monument [would] not.' "). I read the Court's opinion to mean what it says: "[R]etaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones," *ante*, at 57, and, consequently, only "longstanding monuments, symbols, and practices" enjoy "a presumption of constitutionality," *ante*, at 52 (plurality opinion).

I

A

The First Amendment commands that the government "shall make no law" either "respecting an establishment of religion" or "prohibiting the free exercise thereof." See *Everson*, 330 U. S., at 15. Adoption of these complementary provisions followed centuries of "turmoil, civil strife, and persecutio[n], generated in large part by established sects determined to maintain their absolute political and religious supremacy." *Id*, at 8–9. Mindful of that history, the fledgling Republic ratified the Establishment Clause, in the words of Thomas Jefferson, to "buil[d] a wall of separation between church and state." Draft Reply to the Danbury Baptist Association, in 36 Papers of Thomas Jefferson 254, 255 (B. Oberg ed. 2009) (footnote omitted).

This barrier "protect[s] the integrity of individual conscience in religious matters." *McCreary County* v. *American Civil Liberties Union of Ky.*, 545 U. S. 844, 876 (2005). It guards against the "anguish, hardship and bitter strife," *Engel* v. *Vitale*, 370 U. S. 421, 429 (1962), that can occur when "the government weighs in on one side of religious debate," *McCreary County*, 545 U. S., at 876. And while the "union of government and religion tends to destroy government and to degrade religion," separating the two preserves the legitimacy of each. *Engel*, 370 U. S., at 431.

The Establishment Clause essentially instructs: "[T]he government may not favor one religion over another, or religion over irreligion." *McCreary County*, 545 U. S., at 875. For, as James Madison observed, the government is not "a competent Judge of Religious Truth." Memorial and Remonstrance Against Religious Assessments, 8 Papers of James Madison 295, 301 (R. Rutland, W. Rachal, B. Ripel, & F. Teute eds. 1973) (Memorial and Remonstrance). When the government places its "power, prestige [or] financial support . . . behind a particular religious belief," *Engel*, 370

U. S., at 431, the government's imprimatur "mak[es] adherence to [that] religion relevant . . . to a person's standing in the political community," *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 594 (1989) (internal quotation marks omitted). Correspondingly, "the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel*, 370 U. S., at 431. And by demanding neutrality between religious faith and the absence thereof, the Establishment Clause shores up an individual's "right to select any religious faith or none at all." *Wallace* v. *Jaffree*, 472 U. S. 38, 53 (1985).

B

In cases challenging the government's display of a religious symbol, the Court has tested fidelity to the principle of neutrality by asking whether the display has the "effect of 'endorsing' religion." *County of Allegheny*, 492 U. S., at 592. The display fails this requirement if it objectively "convey[s] a message that religion or a particular religious belief is favored or preferred." *Id.*, at 593 (internal quotation marks omitted; emphasis deleted).[3] To make that determination, a court must consider "the pertinent facts and circumstances surrounding the symbol and its placement." *Buono*, 559 U. S., at 721 (plurality opinion); *id.*,

[3] JUSTICE GORSUCH's "no standing" opinion is startling in view of the many religious-display cases this Court has resolved on the merits. *E. g.*, *McCreary County*, 545 U. S. 844; *Van Orden*, 545 U. S. 677; *Stone* v. *Graham*, 449 U. S. 39 (1980) (*per curiam*). And, if JUSTICE GORSUCH is right, three Members of the Court were out of line when they recognized that "[t]he [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall," *Buono*, 559 U. S., at 715 (opinion of Kennedy, J., joined by ROBERTS, C. J., and ALITO, J.) (quoting *County of Allegheny*, 492 U. S., at 661 (second alteration in original), for no one, according to JUSTICE GORSUCH, should be heard to complain about such a thing. But see Brief for Law Professors as *Amici Curiae* (explaining why offended observer standing is necessary and proper).

at 750–751 (Stevens, J., dissenting) (quoting plurality opinion).[4]

As I see it, when a cross is displayed on public property, the government may be presumed to endorse its religious content. The venue is surely associated with the State; the symbol and its meaning are just as surely associated exclusively with Christianity. "It certainly is not common for property owners to open up their property [to] monuments that convey a message with which they do not wish to be associated." *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 471 (2009). To non-Christians, nearly 30% of the population of the United States, Pew Research Center, America's Changing Religious Landscape 4 (2015), the State's choice to display the cross on public buildings or spaces conveys a message of exclusion: It tells them they "are outsiders, not full members of the political community," *County of Allegheny*, 492 U. S., at 625 (O'Connor, J., concurring in part and concurring in judgment) (internal quotation marks omitted). Cf. *Van Orden*, 545 U. S., at 708 (Stevens, J., dissenting) ("The adornment of our public spaces with displays of religious symbols" risks "'offend[ing] nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful.'" (quoting *County of Allegheny*, 492 U. S., at 651 (Stevens, J., concurring in part and dissenting in part))).[5]

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[4] This inquiry has been described by some Members of the Court as the "reasonable observer" standard. See, *e. g.*, *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 806 (1995) (Stevens, J., dissenting); *County of Allegheny*, 492 U. S., at 630–631 (O'Connor, J., concurring in part and concurring in judgment).

[5] See also Jews and Christians Discussion Group in the Central Committee of German Catholics, A Convent and Cross in Auschwitz, in The Continuing Agony: From the Carmelite Convent to the Crosses at Auschwitz 231–232 (A. Berger, H. Cargas, & S. Nowak eds. 2004) ("We Christians must appreciate [that] [t]hroughout history many non-Christians, especially Jews, have experienced the Cross as a symbol of persecution, through the Crusades, the Inquisition and the compulsory baptisms.").

A presumption of endorsement, of course, may be overcome. See *Buono*, 559 U. S., at 718 (plurality opinion) ("The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm."). A display does not run afoul of the neutrality principle if its "setting . . . plausibly indicates" that the government has not sought "either to adopt [a] religious message or to urge its acceptance by others." *Van Orden*, 545 U. S., at 737 (Souter, J., dissenting). The "typical museum setting," for example, "though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Lynch* v. *Donnelly*, 465 U. S. 668, 692 (1984) (O'Connor, J., concurring). Similarly, when a public school history teacher discusses the Protestant Reformation, the setting makes clear that the teacher's purpose is to educate, not to proselytize. The Peace Cross, however, is not of that genre.

II

A

"For nearly two millennia," the Latin cross has been the "defining symbol" of Christianity, R. Jensen, The Cross: History, Art, and Controversy ix (2017), evoking the foundational claims of that faith. Christianity teaches that Jesus Christ was "a divine Savior" who "illuminate[d] a path toward salvation and redemption." *Lynch*, 465 U. S., at 708 (Brennan, J., dissenting). Central to the religion are the beliefs that "the son of God," Jesus Christ, "died on the cross," that "he rose from the dead," and that "his death and resurrection offer the possibility of eternal life." Brief for *Amici* Christian and Jewish Organizations 7.[6] "From its earliest

[6] Under "one widespread reading of Christian scriptures," non-Christians are barred from eternal life and, instead, are condemned to hell. Brief for *Amici* Christian and Jewish Organizations 2. On this reading, the Latin cross symbolizes both the promise of salvation and the threat of damnation by "divid[ing] the world between the saved and the damned." *Id.*, at 12.

times," Christianity was known as "*religio crucis*—the religion of the cross." R. Viladesau, The Beauty of the Cross: The Passion of Christ in Theology and the Arts, From the Catacombs to the Eve of the Renaissance 7 (2006). Christians wear crosses, not as an ecumenical symbol, but to proclaim their adherence to Christianity.

An exclusively Christian symbol, the Latin cross is not emblematic of any other faith. *Buono*, 559 U. S., at 747 (Stevens, J., dissenting); Viladesau, *supra*, at 7 ("[T]he cross and its meaning . . . set Christianity apart from other world religions.").[7] The principal symbol of Christianity around the world should not loom over public thoroughfares, suggesting official recognition of that religion's paramountcy.

B

The Commission urges in defense of its monument that the Latin cross "is not merely a reaffirmation of Christian beliefs"; rather, "when used in the context of a war memorial," the cross becomes "a universal symbol of the sacrifices of those who fought and died." Brief for Petitioner Maryland-National Capital Park and Planning Commission 34–35 (Brief for Planning Commission) (internal quotation marks omitted). See also Brief for United States as *Amicus Curiae* 25 (The Latin cross is "a Christian symbol . . . [b]ut it is also 'a symbol often used to honor and respect [soldiers'] heroic acts.'" (quoting *Buono*, 559 U. S., at 721 (plurality opinion); some internal quotation marks omitted)).

The Commission's "[a]ttempts to secularize what is unquestionably a sacred [symbol] defy credibility and disserve people of faith." *Van Orden*, 545 U. S., at 717 (Stevens, J., dissenting). See, *e. g.*, Brief for *Amici* Christian and Jewish Organizations 7 ("For Christians who think seriously about the events and message that the cross represents, [the Com-

[7] Christianity comprises numerous denominations. The term is here used to distinguish Christian sects from religions that do not embrace the defining tenets of Christianity.

mission's] claims are deeply offensive."). The asserted commemorative meaning of the cross rests on—and is inseparable from—its Christian meaning: "the crucifixion of Jesus Christ and the redeeming benefits of his passion and death," specifically, "the salvation of man." *American Civil Liberties Union of Illinois* v. *St. Charles*, 794 F. 2d 265, 273 (CA7 1986) (internal quotation marks omitted).

Because of its sacred meaning, the Latin cross has been used to mark Christian deaths since at least the fourth century. See Jensen, *supra*, at 68–69. The cross on a grave "says that a Christian is buried here," Brief for *Amici* Christian and Jewish Organizations 8, and "commemorates [that person's death] by evoking a conception of salvation and eternal life reserved for Christians," Brief for *Amicus* Jewish War Veterans 7. As a commemorative symbol, the Latin cross simply "makes no sense apart from the crucifixion, the resurrection, and Christianity's promise of eternal life." Brief for *Amici* Christian and Jewish Organizations 8.[8]

The cross affirms that, thanks to the soldier's embrace of Christianity, he will be rewarded with eternal life. *Id.*, at 8–9. "To say that the cross honors the Christian war dead does not identify a secular meaning of the cross; it merely identifies a common application of the religious meaning." *Id.*, at 8. Scarcely "a universal symbol of sacrifice," the cross is "the symbol of one particular sacrifice." *Buono*, 559 U. S., at 748, n. 8 (Stevens, J., dissenting).[9]

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[8] The Court sets out familiar uses of the Greek cross, including the Red Cross and the Navy Cross, *ante*, at 39–40, 57–58, and maintains that, today, they carry no religious message. But because the Latin cross has never shed its Christian character, its commemorative meaning is exclusive to Christians. The Court recognizes as much in suggesting that the Peace Cross features the Latin cross for the same reason "why Holocaust memorials invariably include Stars of David": those sectarian "symbols . . . signify what death meant for those who are memorialized." *Ante*, at 65.

[9] Christian soldiers have drawn parallels between their experiences in war and Jesus's suffering and sacrifice. See, *e. g.*, C. Dawson, Living Bayonets: A Record of the Last Push 19–20 (1919) (upon finding a crucifix

Every Court of Appeals to confront the question has held that "[m]aking a . . . Latin cross a war memorial does not make the cross secular," it "makes the war memorial sectarian." *Id.*, at 747.[10] See also *Separation of Church and*

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strewn among rubble, a soldier serving in World War I wrote home that Jesus Christ "seem[ed] so like ourselves in His lonely and unhallowed suffering"). This comparison has been portrayed by artists, see, *e. g.*, 7 Encyclopedia of Religion 4348 (2d ed. 2005) (painter George Rouault's 1926 *Miserere* series "compares Christ's suffering with twentieth-century experiences of human sufferings in war"), and documented by historians, see, *e. g.*, R. Schweitzer, The Cross and the Trenches: Religious Faith and Doubt Among British and American Great War Soldiers 28–29 (2003) (given the horrors of trench warfare, "[t]he parallels that soldiers saw between their suffering and Christ's make their identification with Jesus both understandable and revealing"); Lemay, Politics in the Art of War: The American War Cemeteries, 38 Int'l J. Mil. History & Historiography 223, 225 (2018) ("[T]he [cross] grave markers assert the absolute valour and Christ-like heroism of the American dead . . . .").

[10] See 874 F. 3d 195, 207 (CA4 2017) (case below) ("Even in the memorial context, a Latin cross serves not . . . as a generic symbol of death, but rather a Christian symbol of the death of Jesus Christ."); *American Atheists, Inc.* v. *Davenport*, 637 F. 3d 1095, 1122 (CA10 2010) ("[A] memorial cross is not a *generic* symbol of death; it is a *Christian* symbol of death that signifies or memorializes the death of a *Christian*."); *Trunk* v. *San Diego*, 629 F. 3d 1099, 1102 (CA9 2011) ("Resurrection of this Cross as a war memorial does not transform it into a secular monument."); *Separation of Church and State Comm.* v. *Eugene*, 93 F. 3d 617, 619 (CA9 1996) (*per curiam*) ("[T]he City urges that the cross is no longer a religious symbol but a war memorial. This argument . . . fails to withstand Establishment Clause analysis."); *Gonzales* v. *North Twp. of Lake Cty.*, 4 F. 3d 1412, 1418 (CA7 1993) ("[W]e are masters of the obvious, and we know that . . . the Latin cross . . . is '[the] unmistakable symbol of Christianity as practiced in this country today.'" (quoting *Harris* v. *Zion*, 927 F. 2d 1401, 1403 (CA7 1991))). See also *Jewish War Veterans of the United States* v. *United States*, 695 F. Supp. 3, 11 (DC 1988) ("[D]efendants are unable to cite a single federal case where a cross such as the one at issue here has survived Establishment Clause scrutiny.").

The Courts of Appeals have similarly concluded that the Latin cross remains a Christian symbol when used for other purposes. See, *e. g.*, *Robinson* v. *Edmond*, 68 F. 3d 1226, 1232 (CA10 1995) (city seal depicting the cross) ("The religious significance and meaning of the Latin or Christian

State Comm. v. *Eugene*, 93 F. 3d 617, 626 (CA9 1996) (O'Scannlain, J., concurring in result) ("[T]he City's use of a cross to memorialize the war dead may lead observers to believe that the City has chosen to honor only Christian veterans.").

The Peace Cross is no exception. That was evident from the start. At the dedication ceremony, the keynote speaker analogized the sacrifice of the honored soldiers to that of Jesus Christ, calling the Peace Cross "symbolic of Calvary," App. 449, where Jesus was crucified. Local reporters variously described the monument as "[a] mammoth cross, a likeness of the Cross of Calvary, as described in the Bible," *id.*, at 428; "a monster [C]alvary cross," *id.*, at 431; and "a huge sacrifice cross," *id.*, at 439. The character of the monument has not changed with the passage of time.

C

The Commission nonetheless urges that the Latin cross is a "well-established" secular symbol commemorating, in particular, "military valor and sacrifice [in] World War I." Brief for Planning Commission 21. Calling up images of United States cemeteries overseas showing row upon row of cross-shaped gravemarkers, *id.*, at 4–8; see *ante*, at 40–41, 57; Brief for United States as *Amicus Curiae* 26, the Commission overlooks this reality: The cross was never perceived

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cross are unmistakable."); *Carpenter* v. *City and County of San Francisco*, 93 F. 3d 627, 630 (CA9 1996) (103-foot cross in public park) ("The Latin cross . . . [']represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity.'"); *American Civil Liberties Union of Ill.* v. *St. Charles*, 794 F. 2d 265, 272–273 (CA7 1986) (35-foot cross displayed atop a fire house during the Christmas season) ("The cross . . . is 'the principal symbol of the Christian religion, recalling the crucifixion of Jesus Christ and the redeeming benefits of his passion and death.'"); *Friedman* v. *Board of Cty. Comm'rs of Bernalillo Cty.*, 781 F. 2d 777, 782 (CA10 1985) (county seal depicting Latin cross) ("[T]he seal . . . conveys a strong impression to the average observer that Christianity is being endorsed.").

as an appropriate headstone or memorial for Jewish soldiers and others who did not adhere to Christianity.

1

A page of history is worth retelling. On November 11, 1918, the Great War ended. Bereaved families of American soldiers killed in the war sought to locate the bodies of their loved ones, and then to decide what to do with their remains. Once a soldier's body was identified, families could choose to have the remains repatriated to the United States or buried overseas in one of several American military cemeteries, yet to be established. Eventually, the remains of 46,000 soldiers were repatriated, and those of 30,000 soldiers were laid to rest in Europe. American Battle Monuments Commission, Annual Report to the President of the United States Fiscal Year 1925, p. 5 (1926) (ABMC Report).

While overseas cemeteries were under development, the graves of American soldiers in Europe were identified by one of two temporary wooden markers painted white. Christian soldiers were buried beneath the cross; the graves of Jewish soldiers were marked by the Star of David. See L. Budreau, Bodies of War: World War I and the Politics of Commemoration in America, 1919–1933, p. 120 (2010). The remains of soldiers who were neither Christian nor Jewish could be repatriated to the United States for burial under an appropriate headstone.[11]

When the War Department began preparing designs for permanent headstones in 1919, "no topic managed to stir more controversy than the use of religious symbolism." *Id.*,

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[11] For unidentified soldiers buried overseas, the American Battle Monuments Commission (ABMC) used the cross and the Star of David markers "in 'proportion of known Jewish dead to know[n] Christians.'" App. 164. The ABMC later decided that "all unidentified graves would be marked with a [c]ross." *Id.*, at 164, n. 21. This change was prompted by "fear [that] a Star of David would be placed over an [u]nknown Christian," not by the belief that the cross had become a universal symbol. *Ibid.*

at 121–122. Everyone involved in the dispute, however, saw the Latin cross as a Christian symbol, not as a universal or secular one. To achieve uniformity, the War Department initially recommended replacing the temporary sectarian markers with plain marble slabs resembling "those designed for the national cemeteries in the United States." Van Duyne, Erection of Permanent Headstones in the American Military Cemeteries in Europe, The Quartermaster Review (1930) (Quartermaster Report).

The War Department's recommendation angered prominent civil organizations, including the American Legion and the Gold Star associations: the United States, they urged, ought to retain both the cross and Star of David. See *ibid.*; Budreau, *supra*, at 123. In supporting sectarian markers, these groups were joined by the American Battle Monuments Commission (ABMC), a newly created independent agency charged with supervising the establishment of overseas cemeteries. ABMC Report 57. Congress weighed in by directing the War Department to erect headstones "of such design and material as may be agreed upon by the Secretary of War and the American Battle Monuments Commission." *Ibid.* (internal quotation marks omitted). In 1924, the War Department approved the ABMC's "designs for a Cross and Star of David." Quartermaster Report; ABMC Report 57.[12]

Throughout the headstone debate, no one doubted that the Latin cross and the Star of David were sectarian gravemarkers, and therefore appropriate only for soldiers who adhered to those faiths. A committee convened by the War Department composed of representatives from "seven prominent war-time organizations" as well as "religious bodies, Protestant, Jewish, [and] Catholic" agreed "unanimous[ly] . . . that marble crosses be placed on the graves of all *Christian* American dead buried abroad, and that the graves of the

[12] A photograph depicting the two headstones is reproduced in the Appendix, *infra*, at 108.

Jewish American dead be marked by the six-pointed star." Durable Markers in the Form of Crosses for Graves of American Soldiers in Europe, Hearings before the Committee on Military Affairs of the House of Representatives, 68th Cong., 1st Sess., 24 (1924) (emphasis added). The Executive Director of the Jewish Welfare Board stated that "if any religious symbol is erected over the graves, then Judaism should have its symbol over the graves of its dead." *Id.*, at 19. Others expressing views described the Latin cross as the appropriate symbol to "mar[k] the graves of the *Christian* heroes of the American forces." *Id.*, at 24 (emphasis added). As stated by the National Catholic War Council, "the sentiment and desires of all Americans, Christians and Jews alike, are one": "They who served us in life should be honored, as they would have wished, in death." *Ibid.*[13]

Far more crosses than Stars of David, as one would expect, line the grounds of American cemeteries overseas, for Jews composed only 3% of the United States population in 1917. J. Fredman & L. Falk, Jews in American Wars 100 (5th ed. 1954). Jews accounted for nearly 6% of U. S. forces in World War I (in numbers, 250,000), and 3,500 Jewish soldiers died in that war. *Ibid.* Even in Flanders Field, with its "'crosses, row on row,'" *ante*, at 41 (quoting J. McCrae, In Flanders Fields, In Flanders Fields and Other Poems 3 (G. P. Putnam's Sons ed. 1919)), "Stars of David mark the graves of [eight American soldiers] of Jewish faith," American Battle Monuments Commission, Flanders Field American Cemetery and Memorial Visitor Booklet 11.[14]

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[13] As noted, *supra*, at 99, the bodies of soldiers who were neither Christian nor Jewish could be repatriated to the United States and buried in a national cemetery (with a slab headstone), Quartermaster Report, or in a private cemetery (with a headstone of the family's choosing).

[14] Available at https://www.abmc.gov/sites/default/files/publications/FlandersField_Booklet.pdf (all Internet materials as last visited June 18, 2019). For the respective numbers of cross and Star of David headstones, see ABMC, Flanders Field American Cemetery and Memorial Brochure

Reiterating its argument that the Latin cross is a "universal symbol" of World War I sacrifice, the Commission states that "40 World War I monuments . . . built in the United States . . . bear the shape of a cross." Brief for Planning Commission 8 (citing App. 1130). This figure includes memorials that merely "incorporat[e]" a cross. App. 1130.[15] Moreover, the 40 monuments compose only 4% of the "948 outdoor sculptures commemorating the First World War." *Ibid.* The Court lists just seven freestanding cross memorials, *ante*, at 42, n. 10, less than 1% of the total number of monuments to World War I in the United States, see App. 1130. Cross memorials, in short, are outliers. The overwhelming majority of World War I memorials contain no Latin cross.

In fact, the "most popular and enduring memorial of the [post-World War I] decade" was "[t]he mass-produced *Spirit of the American Doughboy* statue." Budreau, Bodies of War, at 139. That statue, depicting a U. S. infantryman, "met with widespread approval throughout American communities." *Ibid.* Indeed, the first memorial to World War I erected in Prince George's County "depict[s] a doughboy." App. 110–111. The Peace Cross, as Plaintiffs' expert historian observed, was an "aberration . . . even in the era [in which] it was built and dedicated." *Id.*, at 123.

Like cities and towns across the country, the United States military comprehended the importance of "pay[ing] equal respect to all members of the Armed Forces who perished in the service of our country," *Buono*, 559 U. S., at 759 (Stevens, J., dissenting), and therefore avoided incorporating the Latin cross into memorials. The construction of the Tomb of the Unknown Soldier is illustrative. When a proposal to place

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2, available at https://www.abmc.gov/sites/default/files/publications/Flanders%20Field_Brochure_Mar2018.pdf.

[15] No other monument in Bladensburg's Veterans Memorial Park displays the Latin cross. For examples of monuments in the Park, see the Appendix, *infra*, at 106–107.

a cross on the Tomb was advanced, the Jewish Welfare Board objected; no cross appears on the Tomb. See App. 167. In sum, "[t]here is simply 'no evidence . . . that the cross has been widely embraced by'—or even applied to—'non-Christians as a secular symbol of death' or of sacrifice in military service" in World War I or otherwise. *Trunk* v. *San Diego*, 629 F. 3d 1099, 1116 (CA9 2011).

D

Holding the Commission's display of the Peace Cross unconstitutional would not, as the Commission fears, "inevitably require the destruction of other cross-shaped memorials throughout the country." Brief for Planning Commission 52. When a religious symbol appears in a public cemetery—on a headstone, or as the headstone itself, or perhaps integrated into a larger memorial—the setting counters the inference that the government seeks "either to adopt the religious message or to urge its acceptance by others." *Van Orden*, 545 U. S., at 737 (Souter, J., dissenting). In a cemetery, the "privately selected religious symbols on individual graves are best understood as the private speech of each veteran." Laycock, Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism, 61 Case W. Res. L. Rev. 1211, 1242 (2011). See also *Summum*, 555 U. S., at 487 (Souter, J., concurring in judgment) ("[T]here are circumstances in which government maintenance of monuments does not look like government speech at all. Sectarian identifications on markers in Arlington Cemetery come to mind."). Such displays are "linked to, and sho[w] respect for, the individual honoree's faith and beliefs." *Buono*, 559 U. S., at 749, n. 8 (Stevens, J., dissenting). They do not suggest governmental endorsement of those faith and beliefs.[16]

[16] As to the Argonne Cross Memorial and the Canadian Cross of Sacrifice in Arlington National Cemetery, visitors to the cemetery "expec[t] to view religious symbols, whether on individual headstones or as standalone monuments." Brief for *Amicus* Jewish War Veterans 17.

Recognizing that a Latin cross does not belong on a public highway or building does not mean the monument must be "torn down." *Ante*, at 68 (BREYER, J., concurring); *ante*, at 79 (GORSUCH, J., concurring in judgment).[17] "[L]ike the determination of the violation itself," the "proper remedy . . . is necessarily context specific." *Buono*, 559 U. S., at 755, n. 11 (Stevens, J., dissenting). In some instances, the violation may be cured by relocating the monument to private land or by transferring ownership of the land and monument to a private party.

* * *

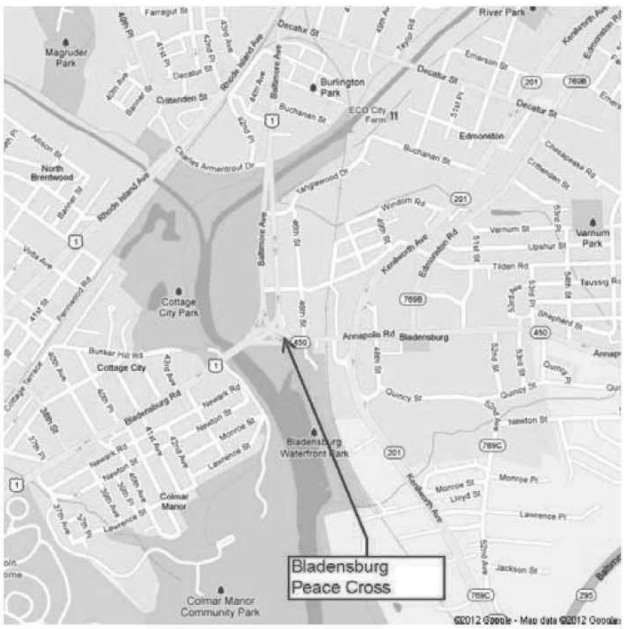
In 1790, President Washington visited Newport, Rhode Island, "a longtime bastion of religious liberty and the home of one of the first communities of American Jews." *Town of Greece* v. *Galloway*, 572 U. S. 565, 636 (2014) (KAGAN, J., dissenting). In a letter thanking the congregation for its warm welcome, Washington praised "[t]he citizens of the United States of America" for "giv[ing] to mankind . . . a policy worthy of imitation": "All possess alike liberty of conscience and immunities of citizenship." Letter to Newport Hebrew Congregation (Aug. 18, 1790), in 6 Papers of George Washington 284, 285 (D. Twohig ed. 1996). As Washington and his contemporaries were aware, "some of them from bitter personal experience," *Engel*, 370 U. S., at 429, religion is "too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate," *id.*, at 432 (quoting Memorial and Remonstrance). The Establishment Clause, which preserves the integrity of both church and state, guarantees that "however . . . individuals worship, they will count as full

[17] The Court asserts that the Court of Appeals "entertained" the possibility of "amputating the arms of the Cross." *Ante*, at 59. The appeals court, however, merely reported Plaintiffs' "desired injunctive relief," namely, "removal or demolition of the Cross, or removal of the arms from the Cross 'to form a non-religious slab or obelisk.'" 874 F. 3d, at 202, n. 7. See also *id.*, at 212, n. 19 (noting that the parties remained "free to explore alternative arrangements that would not offend the Constitution").

and equal American citizens." *Town of Greece*, 572 U. S., at 615 (KAGAN, J., dissenting). "If the aim of the Establishment Clause is genuinely to uncouple government from church," the Clause does "not permit . . . a display of th[e] character" of Bladensburg's Peace Cross. *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 817 (1995) (GINSBURG, J., dissenting).

APPENDIX

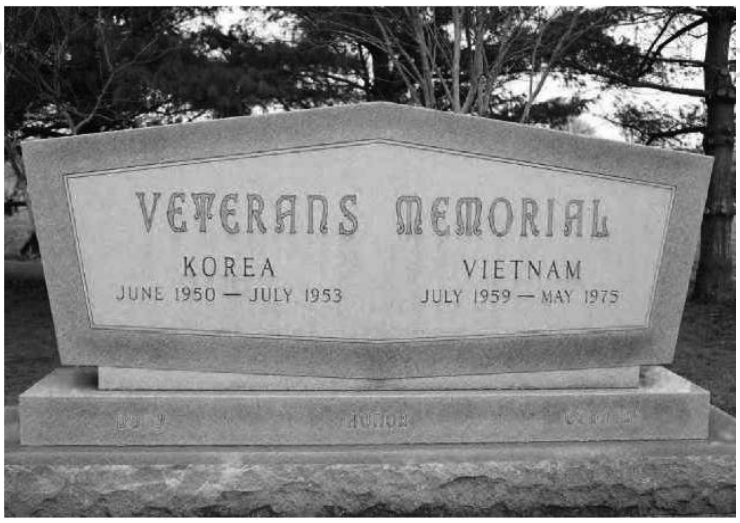
The Bladensburg Peace Cross. App. 887.



Map showing the location of the Peace Cross. App. 1533.

The World War II Memorial in Veterans Memorial Park. App. 891.

Plaque of the World War II Memorial. App. 891.



The Korea-Vietnam Veterans Memorial in Veterans Memorial Park. App. 894.

Appendix to opinion of GINSBURG, J.

Headstones in the Henri-Chappelle American Cemetery and Memorial in Belgium. American Battle Monuments Commission, Henri-Chappelle American Cemetery and Memorial 16 (1986).

Syllabus

McDONOUGH *v.* SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 18–485. Argued April 17, 2019—Decided June 20, 2019

Petitioner Edward McDonough processed ballots as a commissioner of the county board of elections in a primary election in Troy, New York. Respondent Youel Smith was specially appointed to investigate and to prosecute a case of forged absentee ballots in that election. McDonough became his primary target. McDonough alleges that Smith fabricated evidence against him and used it to secure a grand jury indictment. Smith then brought the case to trial and presented allegedly fabricated testimony. That trial ended in a mistrial. Smith again elicited allegedly fabricated evidence in a second trial, which ended on December 21, 2012, with McDonough's acquittal on all charges. On December 18, 2015, McDonough sued Smith under 42 U. S. C. § 1983, asserting, as relevant here, a claim for fabrication of evidence. The District Court dismissed the claim as untimely, and the Second Circuit affirmed. The court held that the 3-year limitations period began to run "when (1) McDonough learned that the evidence was false and was used against him during the criminal proceedings; and (2) he suffered a loss of liberty as a result of that evidence," 898 F. 3d 259, 265. Thus, the court concluded, McDonough's claim was untimely, because those events undisputedly had occurred by the time McDonough was arrested and stood trial.

Held: The statute of limitations for McDonough's § 1983 fabricated-evidence claim began to run when the criminal proceedings against him terminated in his favor—that is, when he was acquitted at the end of his second trial. Pp. 114–125.

(a) The time at which a § 1983 claim accrues "is a question of federal law," "conforming in general to common-law tort principles," and is presumptively—but not always—"when the plaintiff has 'a complete and present cause of action.'" *Wallace* v. *Kato*, 549 U. S. 384, 388. An accrual analysis begins with identifying "the specific constitutional right" alleged to have been infringed. *Manuel* v. *Joliet*, 580 U. S. 357, 370. Here, the claimed right is an assumed due process right not to be deprived of liberty as a result of a government official's fabrication of evidence. P. 115.

Syllabus

(b) Accrual questions are often decided by referring to the common-law principles governing analogous torts. *Wallace*, 549 U. S., at 388. The most analogous common-law tort here is malicious prosecution, which accrues only once the underlying criminal proceedings have resolved in the plaintiff's favor. Following that analogy where it leads: McDonough could not bring his fabricated-evidence claim under § 1983 prior to favorable termination of his prosecution. Malicious prosecution's favorable-termination requirement is rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments, and likewise avoids allowing collateral attacks on criminal judgments through civil litigation. See *Heck* v. *Humphrey*, 512 U. S. 477, 484–485. Because a civil claim such as McDonough's, asserting that fabricated evidence was used to pursue a criminal judgment, implicates the same concerns, it makes sense to adopt the same rule. The principles and reasoning of *Heck*—which emphasized those concerns with parallel litigation and conflicting judgments—confirm the strength of this analogy. This case differs because the plaintiff in *Heck* had been convicted and McDonough was acquitted, but McDonough's claims nevertheless challenge the validity of the criminal proceedings against him in essentially the same manner as the plaintiff in *Heck* challenged the validity of his conviction. Pp. 116–120.

(c) The soundness of this conclusion is reinforced by the consequences that would follow from imposing a ticking limitations clock on criminal defendants as soon as they become aware that fabricated evidence has been used against them. That rule would create practical problems in jurisdictions where prosecutions regularly last nearly as long as—or even longer than—the limitations period. Criminal defendants could face the untenable choice of letting their claims expire or filing a civil suit against the very person who is in the midst of prosecuting them. The parallel civil litigation that would result if plaintiffs chose the second option would run counter to core principles of federalism, comity, consistency, and judicial economy. Smith's suggested workaround—stays and ad hoc abstentions—is poorly suited to the type of claim at issue here. Pp. 120–121.

(d) Smith's counterarguments do not sway the result. First, relying on *Wallace*, Smith argues that *Heck* is irrelevant to McDonough's claim. The Court in *Wallace* rejected the plaintiff's reliance on *Heck*, but *Wallace* involved a false-arrest claim—analogous to common-law false imprisonment—and does not displace the principles in *Heck* that resolve this case. Second, Smith argues that McDonough theoretically could have been prosecuted without the fabricated evidence and was not convicted even with it; and thus, because a violation could exist no matter

its effect on the outcome, the date of that outcome is irrelevant. Although the argument for adopting a favorable-termination requirement would be weaker in the context of a fabricated-evidence claim that does not allege that the violation's consequence was a liberty deprivation occasioned by the criminal proceedings themselves, that is not the nature of McDonough's claim. His claim remains most analogous to a claim of common-law malicious prosecution. Nor does it change the result that McDonough suffered harm prior to his acquittal, because the Court has never suggested that the date on which a constitutional injury first occurs is the only date from which a limitations period may run. Third, Smith argues that the advantages of his rule outweigh its disadvantages as a matter of policy. But his arguments are unconvincing. It is not clear that the Second Circuit's approach would provide more predictable guidance, and while perverse incentives for prosecutors and risk of foreclosing meritorious claims could be valid considerations in other contexts, they do not overcome other considerations here. Pp. 121–125.

898 F. 3d 259, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, ALITO, and KAVANAUGH, JJ., joined. THOMAS, J., filed a dissenting opinion, in which KAGAN and GORSUCH, JJ., joined, *post,* p. 125.

Neal Kumar Katyal argued the cause for petitioner. With him on the briefs were *Katherine B. Wellington*, *Thomas P. Schmidt*, *Brian D. Premo*, and *Joel B. Rudin*.

Deputy Solicitor General Wall argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Jonathan Y. Ellis*, *Barbara L. Herwig*, *Dana L. Kaersvang*, and *Richard Montague*.

Thomas O'Connor argued the cause for respondent. With him on the brief were *David A. Strauss*, *Sarah M. Konsky*, and *Matthew S. Hellman*.*

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*Briefs of *amici curiae* urging reversal were filed for the Cause of Action Institute by *John J. Vecchione* and *Michael R. Geske*; for the Center on the Administration of Criminal Law at NYU School of Law et al. by *Mark W. Mosier*, *Christopher Dunn*, *Ezekiel Edwards*, and *David Cole*; for the Constitutional Accountability Center by *Elizabeth B. Wydra*, *Bri-*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

Petitioner Edward McDonough alleges that respondent Youel Smith fabricated evidence and used it to pursue criminal charges against him. McDonough was acquitted, then sued Smith under 42 U. S. C. § 1983. The courts below, concluding that the limitations period for McDonough's fabricated-evidence claim began to run when the evidence was used against him, determined that the claim was untimely. We hold that the limitations period did not begin to run until McDonough's acquittal, and therefore reverse.

I

This case arises out of an investigation into forged absentee ballots that were submitted in a primary election in Troy, New York, in 2009. McDonough, who processed the ballots in his capacity as a commissioner of the county board of elections, maintains that he was unaware that they had been forged. Smith was specially appointed to investigate and to prosecute the matter.

McDonough's complaint alleges that Smith then set about scapegoating McDonough (against whose family Smith harbored a political grudge), despite evidence that McDonough

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anne J. Gorod, and *Brian R. Frazelle*; for Criminal Defense Organizations et al. by *R. Stanton Jones* and *Andrew T. Tutt*; for the Criminal Justice Institute of Harvard Law School by *Ronald S. Sullivan, Jr.*; for Federal Courts Scholars by *Jon Loevy*; for the Innocence Network by *Benjamin Gruenstein*; and for the St. Thomas More Lawyers Guild of Rochester, New York, by *John M. Regan, Jr.*

Briefs of *amici curiae* urging affirmance were filed for the State of Indiana et al. by *Curtis T. Hill, Jr.*, Attorney General of Indiana, *Thomas M. Fisher*, Solicitor General, *Kian J. Hudson*, Deputy Solicitor General, and *Aaron T. Craft* and *Julia C. Payne*, Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Leslie Rutledge* of Arkansas, *Jeff Landry* of Louisiana, *Doug Peterson* of Nebraska, *Dave Yost* of Ohio, *Alan Wilson* of South Carolina, and *Ken Paxton* of Texas; and for the International Municipal Lawyers Association et al. by *Geoffrey P. Eaton* and *Lisa Soronen*.

was innocent. Smith leaked to the press that McDonough was his primary target and pressured him to confess. When McDonough would not, Smith allegedly fabricated evidence in order to inculpate him. Specifically, McDonough alleges that Smith falsified affidavits, coached witnesses to lie, and orchestrated a suspect DNA analysis to link McDonough to relevant ballot envelopes.

Relying in part on this allegedly fabricated evidence, Smith secured a grand jury indictment against McDonough. McDonough was arrested, arraigned, and released (with restrictions on his travel) pending trial. Smith brought the case to trial a year later, in January 2012. He again presented the allegedly fabricated testimony during this trial, which lasted more than a month and ended in a mistrial. Smith then reprosecuted McDonough. The second trial also lasted over a month, and again, Smith elicited allegedly fabricated testimony. The second trial ended with McDonough's acquittal on all charges on December 21, 2012.

On December 18, 2015, just under three years after his acquittal, McDonough sued Smith and other defendants under § 1983 in the U. S. District Court for the Northern District of New York. Against Smith, McDonough asserted two different constitutional claims: one for fabrication of evidence, and one for malicious prosecution without probable cause. The District Court dismissed the malicious prosecution claim as barred by prosecutorial immunity, though timely. It dismissed the fabricated-evidence claim, however, as untimely.

McDonough appealed to the U. S. Court of Appeals for the Second Circuit, which affirmed. 898 F. 3d 259 (2018). The Court of Appeals agreed with the District Court's disposition of the malicious prosecution claim. As for the timeliness of the fabricated-evidence claim, because all agreed that the relevant limitations period is three years, *id.*, at 265, the question was when that limitations period began to run: upon McDonough's acquittal, or at some point earlier. In

essence, given the dates at issue, McDonough's claim was timely only if the limitations period began running at acquittal.

The Court of Appeals held that McDonough's fabricated-evidence claim accrued, and thus the limitations period began to run, "when (1) McDonough learned that the evidence was false and was used against him during the criminal proceedings; and (2) he suffered a loss of liberty as a result of that evidence." *Ibid.* This rule, in the Second Circuit's view, followed from its conclusion that a plaintiff has a complete fabricated-evidence claim as soon as he can show that the defendant's knowing use of the fabricated evidence caused him some deprivation of liberty. *Id.*, at 266. Those events undisputedly had occurred by the time McDonough was arrested and stood trial. *Ibid.*

As the Second Circuit acknowledged, *id.*, at 267, other Courts of Appeals have held that the statute of limitations for a fabricated-evidence claim does not begin to run until favorable termination of the challenged criminal proceedings.[1] We granted certiorari to resolve the conflict, 586 U. S. 1112 (2019), and now reverse.

II

The statute of limitations for a fabricated-evidence claim like McDonough's does not begin to run until the criminal proceedings against the defendant (*i. e.*, the § 1983 plaintiff) have terminated in his favor. This conclusion follows both from the rule for the most natural common-law analogy (the tort of malicious prosecution) and from the practical considerations that have previously led this Court to defer accrual of claims that would otherwise constitute an untenable collateral attack on a criminal judgment.

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[1] See *Floyd* v. *Attorney General of Pa.*, 722 Fed. Appx. 112, 114 (CA3 2018); *Mills* v. *Barnard*, 869 F. 3d 473, 484 (CA6 2017); *Bradford* v. *Scherschligt*, 803 F. 3d 382, 388 (CA9 2015); *Castellano* v. *Fragozo*, 352 F. 3d 939, 959–960 (CA5 2003) (en banc).

A

The question here is when the statute of limitations began to run. Although courts look to state law for the length of the limitations period, the time at which a § 1983 claim accrues "is a question of federal law," "conforming in general to common-law tort principles." *Wallace* v. *Kato*, 549 U. S. 384, 388 (2007). That time is presumptively "when the plaintiff has 'a complete and present cause of action,'" *ibid.*, though the answer is not always so simple. See, *e. g.*, *id.*, at 388–391, and n. 3; *Dodd* v. *United States*, 545 U. S. 353, 360 (2005). Where, for example, a particular claim may not realistically be brought while a violation is ongoing, such a claim may accrue at a later date. See *Wallace*, 549 U. S., at 389.

An accrual analysis begins with identifying "'the specific constitutional right'" alleged to have been infringed. *Manuel* v. *Joliet*, 580 U. S. 357, 370 (2017) (quoting *Albright* v. *Oliver*, 510 U. S. 266, 271 (1994) (plurality opinion)). Though McDonough's complaint does not ground his fabricated-evidence claim in a particular constitutional provision, the Second Circuit treated his claim as arising under the Due Process Clause. 898 F. 3d, at 266. McDonough's claim, this theory goes, seeks to vindicate a "'right not to be deprived of liberty as a result of the fabrication of evidence by a government officer.'" *Ibid.* (quoting *Zahrey* v. *Coffey*, 221 F. 3d 342, 349 (CA2 2000)); see also, *e. g.*, *Napue* v. *Illinois*, 360 U. S. 264, 269 (1959). We assume without deciding that the Second Circuit's articulations of the right at issue and its contours are sound, having not granted certiorari to resolve those separate questions. See *Heck* v. *Humphrey*, 512 U. S. 477, 480, n. 2 (1994) (accepting the lower courts' characterization of the relevant claims).[2]

[2] In accepting the Court of Appeals' treatment of McDonough's claim as one sounding in denial of due process, we express no view as to what other constitutional provisions (if any) might provide safeguards against the creation or use of fabricated evidence enforceable through a 42 U. S. C. § 1983 action. See *Soldal* v. *Cook County*, 506 U. S. 56, 70 (1992) ("Certain

B

As noted above, this Court often decides accrual questions by referring to the common-law principles governing analogous torts. See *Wallace*, 549 U. S., at 388; *Heck*, 512 U. S., at 483. These "principles are meant to guide rather than to control the definition of § 1983 claims," such that the common law serves "'more as a source of inspired examples than of prefabricated components.'" *Manuel*, 580 U. S., at 370.

Relying on our decision in *Heck*, McDonough analogizes his fabricated-evidence claim to the common-law tort of malicious prosecution, a type of claim that accrues only once the underlying criminal proceedings have resolved in the plaintiff's favor. 512 U. S., at 484; Prosser & Keeton § 119, at 871, 874–875; Restatement (Second) of Torts §§ 653, 658 (1976); 3 D. Dobbs, P. Hayden, & E. Bublick, Law of Torts §§ 586, 590, pp. 388–389, 402–404 (2d ed. 2011) (Dobbs). McDonough is correct that malicious prosecution is the most analogous common-law tort here.

Common-law malicious prosecution requires showing, in part, that a defendant instigated a criminal proceeding with improper purpose and without probable cause. Restate-

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wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands"). Moreover, because the Second Circuit understood McDonough's due process claim to allege a deprivation of liberty, we have no occasion to consider the proper handling of a fabricated-evidence claim founded on an allegation that the use of fabricated evidence was so egregious as to shock the conscience, see, *e. g.*, *County of Sacramento* v. *Lewis*, 523 U. S. 833, 849 (1998), or caused harms exclusively to "interests other than the interest in freedom from physical restraint," *Albright* v. *Oliver*, 510 U. S. 266, 283 (1994) (Kennedy, J., concurring in judgment); see also, *e. g.*, W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 119, p. 870 (5th ed. 1984) (Prosser & Keeton) ("[O]ne who is wrongfully prosecuted may suffer both in reputation and by confinement"). Accordingly, we do not address what the accrual rule would be for a claim rooted in other types of harm independent of a liberty deprivation, as no such claim is before us. See 898 F. 3d 259, 266 (CA2 2018).

ment (Second) of Torts § 653; see also Dobbs § 586, at 388–389; Prosser & Keeton § 119, at 871.[3] The essentials of McDonough's claim are similar: His claim requires him to show that the criminal proceedings against him—and consequent deprivations of his liberty[4]—were caused by Smith's malfeasance in fabricating evidence. At bottom, both claims challenge the integrity of criminal prosecutions undertaken "pursuant to legal process." *Heck*, 512 U. S., at 484.[5]

We follow the analogy where it leads: McDonough could not bring his fabricated-evidence claim under § 1983 prior to favorable termination of his prosecution. As *Heck* explains, malicious prosecution's favorable-termination requirement is

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[3] The Second Circuit borrowed the common-law elements of malicious prosecution to govern McDonough's distinct constitutional malicious prosecution claim, which is not before us. See *id.*, at 268, n. 10. This Court has not defined the elements of such a § 1983 claim, see *Manuel* v. *Joliet*, 580 U. S. 357, 372–373 (2017), and this case provides no occasion to opine on what the elements of a constitutional malicious prosecution action under § 1983 are or how they may or may not differ from those of a fabricated-evidence claim. Similarly, while noting that only McDonough's malicious prosecution claim was barred on absolute-immunity grounds below, we make no statement on whether or how the doctrine of absolute immunity would apply to McDonough's fabricated-evidence claim. Any further consideration of that question is properly addressed by the Second Circuit on remand, subject to ordinary principles of waiver and forfeiture.

[4] Though McDonough was not incarcerated pending trial, he was subject to restrictions on his ability to travel and other "'restraints not shared by the public generally,'" *Justices of Boston Municipal Court* v. *Lydon*, 466 U. S. 294, 301 (1984), and as the case comes to this Court, it is undisputed that McDonough has pleaded a liberty deprivation. See 898 F. 3d, at 266.

[5] Smith urges the Court to steer away from the comparison to malicious prosecution, noting that the Second Circuit treats malicious prosecution claims and fabricated-evidence claims as distinct. See *id.*, at 268, and n. 12. But two constitutional claims may differ yet still both resemble malicious prosecution more than any other common-law tort; comparing constitutional and common-law torts is not a one-to-one matching exercise. See, *e. g.*, *Heck*, 512 U. S., at 479, 484 (analogizing malicious prosecution to several distinct claims). Tellingly, Smith has not suggested an alternative common-law analogy. See Tr. of Oral Arg. 44–46.

rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments. See *id.*, at 484–485; see also Prosser & Keeton § 119, at 874; Dobbs § 589, at 402. The requirement likewise avoids allowing collateral attacks on criminal judgments through civil litigation. *Heck*, 512 U. S., at 484. These concerns track "similar concerns for finality and consistency" that have motivated this Court to refrain from multiplying avenues for collateral attack on criminal judgments through civil tort vehicles such as § 1983. *Id.*, at 485; see also *Preiser* v. *Rodriguez*, 411 U. S. 475, 490 (1973) (noting the "strong policy requiring exhaustion of state remedies" in order "to avoid the unnecessary friction between the federal and state court systems"); *Younger* v. *Harris*, 401 U. S. 37, 43 (1971) ("Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts"). Because a civil claim such as McDonough's, asserting that fabricated evidence was used to pursue a criminal judgment, implicates the same concerns, it makes sense to adopt the same rule.[6]

Heck confirms the strength of this analogy. In *Heck*, a prisoner serving a 15-year sentence for manslaughter sought damages under § 1983 against state prosecutors and an investigator for alleged misconduct similar to that alleged here, including knowingly destroying exculpatory evidence and causing an illegal voice identification procedure to be employed at the prisoner's trial. 512 U. S., at 478–479. The

[6] Such considerations are why Congress has determined that a petition for writ of habeas corpus, not a § 1983 action, "is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement," *Preiser* v. *Rodriguez*, 411 U. S. 475, 490 (1973), including confinement pending trial before any conviction has occurred, see *id.*, at 491 (citing *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484 (1973)).

Court took as a given the lower courts' conclusion that those claims all effectively "challeng[ed] the legality of" the plaintiff's conviction. *Id.*, at 480, n. 2. Looking first to the common law, the Court observed that malicious prosecution "provide[d] the closest analogy to" such claims because, unlike other potentially analogous common-law claims, malicious prosecution "permits damages for confinement imposed pursuant to legal process." *Id.*, at 484.

Emphasizing the concerns with parallel litigation and conflicting judgments just discussed, see *id.*, at 484–486, the Court in *Heck* held that "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," a plaintiff in a § 1983 action first had to prove that his conviction had been invalidated in some way, *id.*, at 486. This favorable-termination requirement, the Court explained, applies whenever "a judgment in favor of the plaintiff would necessarily imply" that his prior conviction or sentence was invalid. *Id.*, at 487.

This case differs from *Heck* because the plaintiff in *Heck* had been convicted, while McDonough was acquitted. Although some claims do fall outside *Heck*'s ambit when a conviction is merely "anticipated," *Wallace*, 549 U. S., at 393, however, McDonough's claims are not of that kind, see *infra*, at 121–123. As articulated by the Court of Appeals, his claims challenge the validity of the criminal proceedings against him in essentially the same manner as the plaintiff in *Heck* challenged the validity of his conviction. And the pragmatic considerations discussed in *Heck* apply generally to civil suits within the domain of habeas corpus, not only to those that challenge convictions. See *Preiser*, 411 U. S., at 490–491. The principles and reasoning of *Heck* thus point toward a corollary result here: There is not "'a complete and present cause of action,'" *Wallace*, 549 U. S., at 388, to bring a fabricated-evidence challenge to criminal proceedings while those criminal proceedings are ongoing. Only once

the criminal proceeding has ended in the defendant's favor, or a resulting conviction has been invalidated within the meaning of *Heck*, see 512 U. S., at 486–487, will the statute of limitations begin to run.[7]

C

The soundness of this conclusion is reinforced by the consequences that would follow from the Second Circuit's approach, which would impose a ticking limitations clock on criminal defendants as soon as they become aware that fabricated evidence has been used against them. Such a rule would create practical problems in jurisdictions where prosecutions regularly last nearly as long as—or even longer than—the relevant civil limitations period. See Brief for Petitioner 53–55; Brief for Criminal Defense Organizations et al. as *Amici Curiae* 23–24. A significant number of criminal defendants could face an untenable choice between (1) letting their claims expire and (2) filing a civil suit against the very person who is in the midst of prosecuting them. The first option is obviously undesirable, but from a criminal defendant's perspective the latter course, too, is fraught with peril: He risks tipping his hand as to his defense strategy, undermining his privilege against self-incrimination, and taking on discovery obligations not required in the criminal context. See *SEC* v. *Dresser Industries, Inc.*, 628 F. 2d 1368, 1376 (CADC 1980) (en banc). Moreover, as noted above, the parallel civil litigation that would result if plaintiffs chose the second option would run counter to core principles of federalism, comity, consistency, and judicial economy. See *supra*, at 117–119.

Smith suggests that stays and ad hoc abstention are sufficient to avoid the problems of two-track litigation. Such workarounds are indeed available when claims falling outside

[7] Because McDonough was not free to sue prior to his acquittal, we need not reach his alternative argument that his claim was timely because it alleged a continuing violation.

Heck's scope nevertheless are initiated while a state criminal proceeding is pending, see *Wallace*, 549 U. S., at 393–394 (noting the power of district courts to stay civil actions while criminal prosecutions proceed); *Heck*, 512 U. S., at 487–488, n. 8 (noting possibility of abstention), but Smith's solution is poorly suited to the type of claim at issue here. When, as here, a plaintiff's claim "necessarily" questions the validity of a state proceeding, *id.*, at 487, there is no reason to put the onus to safeguard comity on district courts exercising case-by-case discretion—particularly at the foreseeable expense of potentially prejudicing litigants and cluttering dockets with dormant, unripe cases. Cf. *Panetti* v. *Quarterman*, 551 U. S. 930, 943 (2007) (noting that a scheme requiring "conscientious defense attorneys" to file unripe suits "would add to the burden imposed on courts, applicants, and the States, with no clear advantage to any"). The accrual rule we adopt today, by contrast, respects the autonomy of state courts and avoids these costs to litigants and federal courts.

In deferring rather than inviting such suits, we adhere to familiar principles. The proper approach in our federal system generally is for a criminal defendant who believes that the criminal proceedings against him rest on knowingly fabricated evidence to defend himself at trial and, if necessary, then to attack any resulting conviction through collateral review proceedings. McDonough therefore had a complete and present cause of action for the loss of his liberty only once the criminal proceedings against him terminated in his favor.

III

Smith's counterarguments do not sway the result.

First, Smith argues that *Heck* is irrelevant to McDonough's claim, relying on this Court's opinion in *Wallace*. *Wallace* held that the limitations period begins to run on a § 1983 claim alleging an unlawful arrest under the Fourth Amendment as soon as the arrestee "becomes detained pursuant to legal process," not when he is ultimately released.

549 U. S., at 397. The Court rejected the plaintiff's reliance on *Heck*, stating that the *Heck* rule comes "into play only when there exists 'a conviction or sentence that has *not* been . . . invalidated,' that is to say, an 'outstanding criminal judgment.'" *Wallace*, 549 U. S., at 393. The Court thus declined to adopt the plaintiff's theory "that an action which would impugn *an anticipated future conviction* cannot be brought until that conviction occurs and is set aside," because doing so in the context of an action for false arrest would require courts and litigants "to speculate about whether a prosecution will be brought, whether it will result in conviction, and whether the pending civil action will impugn that verdict—all this at a time when it can hardly be known what evidence the prosecution has in its possession." *Ibid.* (citation omitted).[8]

Smith is correct that *Heck* concerned a plaintiff serving a sentence for a still-valid conviction and that *Wallace* distinguished *Heck* on that basis, but *Wallace* did not displace the principles in *Heck* that resolve this case. A false-arrest claim, *Wallace* explained, has a life independent of an ongoing trial or putative future conviction—it attacks the arrest only to the extent it was without legal process, even if legal process later commences. See 549 U. S., at 389–390, 393. That feature made the claim analogous to common-law false imprisonment. *Id.*, at 389. By contrast, a claim like McDonough's centers on evidence used to secure an indictment and at a criminal trial, so it does not require "speculat[ion] about whether a prosecution will be brought." *Id.*, at 393. It directly challenges—and thus necessarily threatens to impugn—the prosecution itself. See *Heck*, 512 U. S., at 486–487.

Second, Smith notes (1) that a fabricated-evidence claim in the Second Circuit (unlike a malicious prosecution claim) can exist even if there is probable cause and (2) that McDonough

[8] *Heck* itself suggested that a similar rule might allow at least some Fourth Amendment unlawful-search claims to proceed without a favorable termination. See 512 U. S., at 487, n. 7.

was acquitted. In other words, McDonough theoretically could have been prosecuted without the fabricated evidence, and he was not convicted even with it. Because a violation thus could exist no matter its effect on the outcome, Smith reasons, "the date on which that outcome occurred is irrelevant." Brief for Respondent 26.

Smith is correct in one sense. One could imagine a fabricated-evidence claim that does not allege that the violation's consequence was a liberty deprivation occasioned by the criminal proceedings themselves. See n. 2, *supra*. To be sure, the argument for adopting a favorable-termination requirement would be weaker in that context. That is not, however, the nature of McDonough's claim.

As already explained, McDonough's claim remains most analogous to a claim of common-law malicious prosecution, even if the two are not identical. See *supra*, at 116–118. *Heck* explains why favorable termination is both relevant and required for a claim analogous to malicious prosecution that would impugn a conviction, and that rationale extends to an ongoing prosecution as well: The alternative would impermissibly risk parallel litigation and conflicting judgments. See *supra*, at 117–119. If the date of the favorable termination was relevant in *Heck*, it is relevant here.

It does not change the result, meanwhile, that McDonough suffered harm prior to his acquittal. The Court has never suggested that the date on which a constitutional injury first occurs is the only date from which a limitations period may run. Cf. *Wallace*, 549 U. S., at 389–391, and n. 3 (explaining that the statute of limitations for false-arrest claims does not begin running when the initial arrest takes place). To the contrary, the injury caused by a classic malicious prosecution likewise first occurs as soon as legal process is brought to bear on a defendant, yet favorable termination remains the accrual date. See *Heck*, 512 U. S., at 484.[9]

[9] As for Smith's suggestion that the fabricated evidence could not have caused any liberty deprivation where, as here, there could have been probable cause and there was in fact an acquittal, it suffices to reiterate that

Third and finally, Smith argues that the advantages of his rule outweigh its disadvantages as a matter of policy. In his view, the Second Circuit's approach would provide more predictable guidance, while the favorable-termination approach fosters perverse incentives for prosecutors (who may become reluctant to offer favorable resolutions) and risks foreclosing meritorious claims (for example, where an outcome is not clearly "favorable"). These arguments are unconvincing. We agree that clear accrual rules are valuable but fail to see how assessing when proceedings terminated favorably will be, on balance, more burdensome than assessing when a criminal defendant "learned that the evidence was false and was used against him" and deprived him of liberty as a result. 898 F. 3d, at 265. And while the risk of foreclosing certain claims and the potential incentive effects that Smith identifies could be valid considerations in other contexts,[10] they do not overcome the greater danger that plaintiffs will be deterred under Smith's theory from suing for redress of egregious misconduct, see *supra*, at 120–

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we assume the contours of the claim as defined by the Second Circuit, see *supra*, at 115–117, and nn. 2, 4, and thus accept its undisputed conclusion that there was a sufficient liberty deprivation here, see 898 F. 3d, at 266; see also *Garnett* v. *Undercover Officer C0039*, 838 F. 3d 265, 277 (CA2 2016) (explaining that "a further deprivation of liberty can result from the fabrication of evidence even if the initial arrest is lawful").

[10] Because McDonough's acquittal was unquestionably a favorable termination, we have no occasion to address the broader range of ways a criminal prosecution (as opposed to a conviction) might end favorably to the accused. Cf. *Heck*, 512 U. S., at 486–487. To the extent Smith argues that the law in this area should take account of prosecutors' broad discretion over such matters as the terms on which pleas will be offered or whether charges will be dropped, those arguments more properly bear on the question whether a given resolution should be understood as favorable or not. Such considerations might call for a context-specific and more capacious understanding of what constitutes "favorable" termination for purposes of a § 1983 false-evidence claim, but that is not the question before us.

121—nor do they override the guidance of the common law and precedent.

IV

The statute of limitations for McDonough's § 1983 claim alleging that he was prosecuted using fabricated evidence began to run when the criminal proceedings against him terminated in his favor—that is, when he was acquitted at the end of his second trial. The judgment of the United States Court of Appeals for the Second Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE KAGAN and JUSTICE GORSUCH join, dissenting.

We granted certiorari to decide when "the statute of limitations for a Section 1983 claim based on fabrication of evidence in criminal proceedings begins to run." Pet. for Cert. i. McDonough, however, declined to take a definitive position on the "threshold inquiry in a [42 U. S. C.] § 1983 suit": "'identify[ing] the specific constitutional right' at issue." *Manuel* v. *Joliet*, 580 U. S. 357, 370 (2017) (quoting *Albright* v. *Oliver*, 510 U. S. 266, 271 (1994) (plurality opinion)). Because it is only "[a]fter pinpointing that right" that courts can proceed to "determine the elements of, and rules associated with, an action seeking damages for its violation," *Manuel*, 580 U. S., at 370, we should have dismissed this case as improvidently granted.

McDonough's failure to specify which constitutional right the respondent allegedly violated profoundly complicates our inquiry. McDonough argues that malicious prosecution is the common-law tort most analogous to his fabrication-of-evidence claim. But without "'identify[ing] the specific constitutional right' at issue," we cannot adhere to the contours of that right when "applying, selecting among, or adjusting

common-law approaches." *Ibid.* McDonough also contends that his suit is timely because he suffered a continuing constitutional violation, but this argument is similarly difficult to evaluate without identifying precisely what that violation was. Moreover, because the constitutional basis for McDonough's claim is unclear, we are unable to confirm that he has a constitutional claim at all. In my view, it would be both logical and prudent to address that antecedent question before addressing the statute of limitations for that claim.

McDonough also urges us to resolve the question presented by extending *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973), and *Heck* v. *Humphrey*, 512 U. S. 477 (1994). But the analysis under both cases depends on what facts a § 1983 plaintiff would need to prove to prevail on his claim.[1] And McDonough declines to take a position on that issue as well. See Brief for Petitioner 19 ("The Court thus does not need to delve into what the elements of McDonough's constitutional claim are"); see also *id.*, at 37–38, n. 11.

Further complicating this case, McDonough raised a malicious-prosecution claim alongside his fabrication-of-evidence claim. The District Court dismissed that claim on grounds of absolute immunity. McDonough has not fully explained the difference between that claim and his fabrication claim, which he insists is both analogous to the common-law tort of malicious prosecution and distinct from his dismissed malicious-prosecution claim. See Tr. of Oral Arg. 11–12;

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[1] See *Preiser*, 411 U. S., at 500 ("[W]hen a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment," he cannot bring suit under § 1983); *Heck*, 512 U. S., at 486–487 ("[T]o recover damages for allegedly unconstitutional conviction or imprisonment . . . a § 1983 plaintiff must prove that the conviction or sentence has been" reversed, expunged, invalidated, or otherwise called into question); accord, *id.*, at 486, n. 6 (explaining that a § 1983 action will not lie where a plaintiff would have to negate an element of the offense of which he was convicted to succeed on his § 1983 claim).

Reply Brief 3–4. Additionally, it appears that McDonough's fabrication claim could face dismissal on absolute-immunity grounds on remand. Brief for United States as *Amicus Curiae* 29–32.

The Court, while recognizing that it is critical to ascertain the basis for a § 1983 claim when deciding how to "handl[e]" it, *ante*, at 116, n. 2, attempts to evade these issues by "assum[ing] without deciding that the Second Circuit's articulations of the right at issue and its contours are sound." *Ante*, at 115. But because the parties have not accepted the Second Circuit's view that the claim sounds in procedural due process,[2] that claim as "articulated by the Court of Appeals" might be different from the claim McDonough actually brought. *Ante*, at 119. The better course would be to dismiss this case as improvidently granted and await a case in which the threshold question of the basis of a "fabrication-of-evidence" claim is cleanly presented. Moreover, even if the Second Circuit were correct that McDonough asserts a violation of the Due Process Clause, it would be preferable for the Court to determine the claim's elements before deciding its statute of limitations.

* * *

McDonough asks the Court to bypass the antecedent question of the nature and elements of his claim and first determine its statute of limitations. We should have declined the invitation and dismissed the writ of certiorari as improvidently granted. I therefore respectfully dissent.

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[2] See Tr. of Oral Arg. 7 (petitioner) (citing the Fourth and Fourteenth Amendments); *id.*, at 42 (respondent) (asserting that the claim is not a procedural due process claim).

Syllabus

GUNDY *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 17–6086. Argued October 2, 2018—Decided June 20, 2019

Congress has sought, for the past quarter century, to combat sex crimes and crimes against children through sex-offender registration schemes. The Sex Offender Registration and Notification Act (SORNA) makes more "uniform and effective" the prior "patchwork" of registration systems. *Reynolds* v. *United States*, 565 U. S. 432, 435. To that end, it requires a broader range of sex offenders to register and backs up those requirements with criminal penalties. Section 20913 elaborates the "[i]nitial registration" requirements for sex offenders. 34 U. S. C. §§ 20913(b), (d). Subsection (b) sets out the general rule: An offender must register "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement." § 20913(b). Subsection (d) addresses the "[i]nitial registration of sex offenders unable to comply with subsection (b)." The provision states that, for individuals convicted of a sex offense before SORNA's enactment ("pre-Act offenders"), the Attorney General "shall have the authority" to "specify the applicability" of SORNA's registration requirements and "to prescribe rules for [their] registration." § 20913(d). Under that delegated authority, the Attorney General issued a rule specifying that SORNA's registration requirements apply in full to pre-Act offenders. Petitioner Herman Gundy, a pre-Act offender, was convicted of failing to register. Both the District Court and the Second Circuit rejected his claim that Congress unconstitutionally delegated legislative power when it authorized the Attorney General to "specify the applicability" of SORNA's registration requirements to pre-Act offenders.

Held: The judgment is affirmed.

695 Fed. Appx. 639, affirmed.

JUSTICE KAGAN, joined by JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR, concluded that § 20913(d) does not violate the nondelegation doctrine. Pp. 135–148.

(a) Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." § 1. Based on that provision, this Court explained early on that Congress may not transfer to another branch "powers which are strictly and exclusively legislative." *Wayman* v. *Southard*, 10 Wheat. 1, 42–43. But

Congress may confer substantial discretion on executive agencies to implement and enforce the laws. Accordingly, the Court has held, time and time again, that a statutory delegation is constitutional as long as Congress "'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise that authority] is directed to conform.'" *Mistretta* v. *United States*, 488 U. S. 361, 372. Given that standard, a nondelegation inquiry always begins (and often almost ends) with statutory interpretation. Only after a court has determined a challenged statute's meaning can it decide whether the law sufficiently guides executive discretion to accord with Article I. Pp. 135–136.

(b) This Court has already interpreted § 20913(d) to require the Attorney General to apply SORNA to all pre-Act offenders as soon as feasible. In *Reynolds* v. *United States*, 565 U. S. 432, the Court held that SORNA's registration requirements did not apply of their own force to pre-Act offenders. But in doing so, it made clear how far SORNA limited the Attorney General's authority and thereby effectively resolved this case. The Court started from the premise that Congress meant for SORNA's registration requirements to apply to pre-Act offenders, based on the Act's statutory purpose, its definition of sex offender, and its history. But the Court found that Congress had conditioned pre-Act offenders' duty to register on a prior ruling from the Attorney General because "instantaneous registration" of pre-Act offenders "might not prove feasible." *Id.*, at 440–441. SORNA, the majority explained, created a "practical problem[ ]" because it would require "newly registering or reregistering a large number of pre-Act offenders." *Id.*, at 440. In addition, many pre-Act offenders were already out of prison and could not comply with the requirement that they register before completing their sentences. Congress therefore "[a]sk[ed] the Department of Justice, charged with responsibility for implementation, to examine [the issues] and to apply the new registration requirements accordingly." *Id.*, at 441. On that understanding, the Attorney General's role under § 20913(d) was important but limited: It was to apply SORNA to pre-Act offenders as soon as he thought it feasible to do so. Pp. 136–140.

(c) Gundy claims that § 20913(d) empowers the Attorney General to do whatever he wants as to pre-Act offenders, including exempting them from registration forever. He bases that argument on the first half of § 20913(d), isolated from everything else. But this Court has long refused to construe words "in a vacuum," as Gundy attempts. *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809. Rather, the Court interprets statutory provisions—including delegations—by reading the text in "context" and in light of the statutory "purpose." *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 214, 216. Applying

that approach here, it is clear that § 20913(d) requires the Attorney General to register pre-Act offenders as soon as feasible. In SORNA's statement of purpose, Congress announced that "to protect the public," it was "establish[ing] a comprehensive national system for the registration" of "sex offenders." § 20901. The term "comprehensive" means "all-encompassing" or "sweeping." That description could not fit the system SORNA created if the Attorney General could decline, for any reason or no reason at all, to apply SORNA to all pre-Act offenders. The Act's definition of "sex offender" makes the same point. Under that definition, a "sex offender" is "an individual who was convicted of a sex offense." § 20911(1). Congress's use of the past tense shows that SORNA was not merely forward-looking and confirms that the delegation allows only temporary exclusions. The Act's legislative history backs that all up, by showing that the need to register pre-Act offenders was front and center in Congress's thinking. The text and title of § 20913(d) then pinpoint one of the practical problems discussed above: At the moment of SORNA's enactment, many pre-Act offenders were "unable to comply" with the Act's initial registration requirements. § 20913(d). In identifying that issue, § 20913(d) itself reveals the nature of the delegation to the Attorney General. It was to give him the time needed (if any) to address the various implementation issues involved in getting pre-Act offenders into the registration system. Thus, contrary to Gundy, "specify the applicability" does not mean "specify *whether* to apply SORNA" to pre-Act offenders at all. The phrase instead means "specify *how* to apply SORNA" to pre-Act offenders if transitional difficulties require some delay. And no Attorney General has used § 20913(d) in any more expansive way. Pp. 140–145.

(d) Section 20913(d)'s delegation therefore falls well within constitutional bounds. As noted, a delegation is constitutional so long as Congress sets out an intelligible principle to guide the delegee's exercise of authority. The standards for that principle are not demanding. See *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 474–475. Only twice in this country's history has the Court found a delegation excessive, in each case because "Congress had failed to articulate *any* policy or standard" to confine discretion. *Mistretta*, 488 U. S., at 373, n. 3; see *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388. By contrast, the Court has over and over upheld even very broad delegations. See, *e. g.*, *National Broadcasting Co.* v. *United States*, 319 U. S. 190. In that context, the delegation in SORNA easily passes muster. The authority § 20913(d) confers, as compared to the delegations the Court has upheld in the past, is distinctly small bore. Indeed, if SORNA's delegation is

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unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs. Pp. 145–148.

JUSTICE ALITO concluded that he cannot say that the statute at issue lacks an adequately discernible standard under the nondelegation approach the Court has taken for the past 84 years, but would reconsider that approach in an appropriate case. Pp. 148–149.

KAGAN, J., announced the judgment of the Court and delivered an opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. ALITO, J., filed an opinion concurring in the judgment, *post*, p. 148. GORSUCH, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS, J., joined, *post*, p. 149. KAVANAUGH, J., took no part in the consideration or decision of the case.

Sarah Baumgartel argued the cause for petitioner. With her on the briefs were *Yuanchung Lee*, *Barry D. Leiwant*, *Edward S. Zas*, *Jeffrey L. Fisher*, *David T. Goldberg*, and *Pamela S. Karlan*.

Deputy Solicitor General Wall argued the cause for the United States. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Benczkowski*, *Jonathan C. Bond*, and *Sonja M. Ralston*.*

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*Briefs of *amici curiae* urging reversal were filed for the Becket Fund by *Eric Rassbach* and *Diana M. Verm*; for the Cato Institute et al. by *Ilya Shapiro*; for the Downsize DC Foundation et al. by *Herbert W. Titus*, *William J. Olson*, *Jeremiah L. Morgan*, *Robert J. Olson*, and *Joseph W. Miller*; for the Institute for Justice by *Sheldon Gilbert* and *Dana Berliner*; for the National Association of Criminal Defense Lawyers by *Donald M. Falk*; for the New Civil Liberties Alliance by *Jonathan F. Mitchell* and *Margaret A. Little*; for the Pacific Legal Foundation by *Todd Gaziano*, *Mark Miller*, and *Anthony L. François*; and for William D. Araiza et al. by *Andrew D. Silverman* and *Alison M. Kilmartin*.

Briefs of *amici curiae* were filed for the American Civil Liberties Union by *David D. Cole*, *Amanda W. Shanor*, and *Ezekiel R. Edwards*; for the Center for Constitutional Jurisprudence by *Anthony T. Caso* and *John C. Eastman*; for the Competitive Enterprise Institute et al. by *Sam Kazman*; for the National Association of Federal Defenders by *Donna F. Coltharp*, *John P. Rhodes*, *Sarah S. Gannett*, and *Daniel L. Kaplan*; and for Scholars Whose Work Includes Sex Offense Studies by *Sean Hecker*.

JUSTICE KAGAN announced the judgment of the Court and delivered an opinion, in which JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join.

The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government. This case requires us to decide whether 34 U. S. C. § 20913(d), enacted as part of the Sex Offender Registration and Notification Act (SORNA), violates that doctrine. We hold it does not. Under § 20913(d), the Attorney General must apply SORNA's registration requirements as soon as feasible to offenders convicted before the statute's enactment. That delegation easily passes constitutional muster.

I

Congress has sought, for the past quarter century, to combat sex crimes and crimes against children through sex-offender registration schemes. In 1994, Congress first conditioned certain federal funds on States' adoption of registration laws meeting prescribed minimum standards. See Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, § 170101, 108 Stat. 2038, 42 U. S. C. § 14071 *et seq.* (1994 ed.). Two years later, Congress strengthened those standards, most notably by insisting that States inform local communities of registrants' addresses. See Megan's Law, § 2, 110 Stat. 1345, note following 42 U. S. C. § 13701 (1994 ed., Supp. II). By that time, every State and the District of Columbia had enacted a sex-offender registration law. But the state statutes varied along many dimensions, and Congress came to realize that their "loopholes and deficiencies" had allowed over 100,000 sex offenders (about 20% of the total) to escape registration. See H. R. Rep. No. 109–218, pt. 1, pp. 20, 23–24, 26 (2005) (referring to those sex offenders as "missing" or "lost"). In 2006, to address those failings, Congress enacted SORNA. See 120 Stat. 590, 34 U. S. C. § 20901 *et seq.*

SORNA makes "more uniform and effective" the prior "patchwork" of sex-offender registration systems. *Rey-*

nolds v. *United States*, 565 U. S. 432, 435 (2012). The Act's express "purpose" is "to protect the public from sex offenders and offenders against children" by "establish[ing] a comprehensive national system for [their] registration." § 20901. To that end, SORNA covers more sex offenders, and imposes more onerous registration requirements, than most States had before. The Act also backs up those requirements with new criminal penalties. Any person required to register under SORNA who knowingly fails to do so (and who travels in interstate commerce) may be imprisoned for up to ten years. See 18 U. S. C. § 2250(a).

The basic registration scheme works as follows. A "sex offender" is defined as "an individual who was convicted of" specified criminal offenses: all offenses "involving a sexual act or sexual contact" and additional offenses "against a minor." 34 U. S. C. §§ 20911(1), (5)(A), (7). Such an individual must register—provide his name, address, and certain other information—in every State where he resides, works, or studies. See §§ 20913(a), 20914. And he must keep the registration current, and periodically report in person to a law enforcement office, for a period of between fifteen years and life (depending on the severity of his crime and his history of recidivism). See §§ 20915, 20918.

Section 20913—the disputed provision here—elaborates the "[i]nitial registration" requirements for sex offenders. §§ 20913(b), (d). Subsection (b) sets out the general rule: An offender must register "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement" (or, if the offender is not sentenced to prison, "not later than [three] business days after being sentenced"). Two provisions down, subsection (d) addresses (in its title's words) the "[i]nitial registration of sex offenders unable to comply with subsection (b)." The provision states:

> "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment

> of this chapter . . . and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b)."

Subsection (d), in other words, focuses on individuals convicted of a sex offense before SORNA's enactment—a group we will call pre-Act offenders. Many of these individuals were unregistered at the time of SORNA's enactment, either because pre-existing law did not cover them or because they had successfully evaded that law (so were "lost" to the system). See *supra*, at 132. And of those potential new registrants, many or most could not comply with subsection (b)'s registration rule because they had already completed their prison sentences. For the entire group of pre-Act offenders, once again, the Attorney General "shall have the authority" to "specify the applicability" of SORNA's registration requirements and "to prescribe rules for [their] registration."

Under that delegated authority, the Attorney General issued an interim rule in February 2007, specifying that SORNA's registration requirements apply in full to "sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 72 Fed. Reg. 8897. The final rule, issued in December 2010, reiterated that SORNA applies to all pre-Act offenders. 75 Fed. Reg. 81850. That rule has remained the same to this day.

Petitioner Herman Gundy is a pre-Act offender. The year before SORNA's enactment, he pleaded guilty under Maryland law for sexually assaulting a minor. After his release from prison in 2012, Gundy came to live in New York. But he never registered there as a sex offender. A few years later, he was convicted for failing to register, in violation of § 2250. He argued below (among other things) that Congress unconstitutionally delegated legislative power when it authorized the Attorney General to "specify the applicability" of SORNA's registration requirements to pre-Act offenders. § 20913(d). The District Court and Court of Ap-

peals for the Second Circuit rejected that claim, see 695 Fed. Appx. 639 (2017), as had every other court (including eleven Courts of Appeals) to consider the issue. We nonetheless granted certiorari. 583 U. S. 1166 (2018). Today, we join the consensus and affirm.

II

Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." § 1. Accompanying that assignment of power to Congress is a bar on its further delegation. Congress, this Court explained early on, may not transfer to another branch "powers which are strictly and exclusively legislative." *Wayman* v. *Southard*, 10 Wheat. 1, 42–43 (1825). But the Constitution does not "deny[ ] to the Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s]." *Yakus* v. *United States*, 321 U. S. 414, 425 (1944) (internal quotation marks omitted). Congress may "obtain[ ] the assistance of its coordinate Branches"—and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws. *Mistretta* v. *United States*, 488 U. S. 361, 372 (1989). "[I]n our increasingly complex society, replete with ever changing and more technical problems," this Court has understood that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Ibid.* So we have held, time and again, that a statutory delegation is constitutional as long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Ibid.* (quoting *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394, 409 (1928); brackets in original).

Given that standard, a nondelegation inquiry always begins (and often almost ends) with statutory interpretation. The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discre-

tion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides. See, *e. g.*, *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 473 (2001) (construing the text of a delegation to place constitutionally adequate "limits on the EPA's discretion"); *American Power & Light Co.* v. *SEC*, 329 U. S. 90, 104–105 (1946) (interpreting a statutory delegation, in light of its "purpose[,] factual background[, and] context," to provide sufficiently "definite" standards). Only after a court has determined a challenged statute's meaning can it decide whether the law sufficiently guides executive discretion to accord with Article I. And indeed, once a court interprets the statute, it may find that the constitutional question all but answers itself.

That is the case here, because § 20913(d) does not give the Attorney General anything like the "unguided" and "unchecked" authority that Gundy says. Brief for Petitioner 37, 45. The provision, in Gundy's view, "grants the Attorney General plenary power to determine SORNA's applicability to pre-Act offenders—to require them to register, or not, as she sees fit, and to change her policy for any reason and at any time." *Id.*, at 42. If that were so, we would face a nondelegation question. But it is not. This Court has already interpreted § 20913(d) to say something different—to require the Attorney General to apply SORNA to all pre-Act offenders as soon as feasible. See *Reynolds*, 565 U. S., at 442–443. And revisiting that issue yet more fully today, we reach the same conclusion. The text, considered alongside its context, purpose, and history, makes clear that the Attorney General's discretion extends only to considering and addressing feasibility issues. Given that statutory meaning, Gundy's constitutional claim must fail. Section 20913(d)'s delegation falls well within permissible bounds.

A

This is not the first time this Court has had to interpret § 20913(d). In *Reynolds*, the Court considered whether

SORNA's registration requirements applied of their own force to pre-Act offenders or instead applied only once the Attorney General said they did. We read the statute as adopting the latter approach. But even as we did so, we made clear how far SORNA limited the Attorney General's authority. And in that way, we effectively resolved the case now before us.

Everything in *Reynolds* started from the premise that Congress meant for SORNA's registration requirements to apply to pre-Act offenders. The majority recounted SORNA's "basic statutory purpose," found in its text, as follows: "the 'establish[ment of] a comprehensive national system for the registration of [sex] offenders' that *includes* offenders who committed their offenses before the Act became law." 565 U. S., at 442 (quoting § 20901; emphasis and alterations in original; citation omitted). That purpose, the majority further noted, informed SORNA's "broad[ ]" definition of "sex offender," which "include[s] any 'individual who *was* convicted of a sex offense.'" *Id.*, at 442 (quoting § 20911(1); emphasis added). And those two provisions were at one with "[t]he Act's history." *Id.*, at 442. Quoting statements from both the House and the Senate about the sex offenders then "lost" to the system, *Reynolds* explained that the Act's "supporters placed considerable importance upon the registration of pre-Act offenders." *Ibid.* In recognizing all this, the majority (temporarily) bonded with the dissenting Justices, who found it obvious that SORNA was "meant to cover pre-Act offenders." *Id.*, at 448 (Scalia, J., dissenting). And indeed, the dissent emphasized that common ground, remarking that "the Court acknowledges" and "rightly believes" that registration of pre-Act offenders was "what the statute sought to achieve." *Id.*, at 448–449.[1]

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[1] As to that point, the dissent criticized the majority only for basing its view in part on legislative history. 565 U. S., at 448, n. (opinion of Scalia, J.). The dissent found the majority's excursion into history "quite superfluous" given that the "text of the Act itself makes clear that Congress sought" to ensure the registration of all pre-Act offenders. *Ibid.* In

But if that was so, why had Congress (as the majority held) conditioned the pre-Act offenders' duty to register on a prior "ruling from the Attorney General"? *Id.*, at 441. The majority had a simple answer: "*[I]nstantaneous* registration" of pre-Act offenders "might not prove feasible," or "[a]t least Congress might well have so thought." *Id.*, at 440–441, 443. Here, the majority explained that SORNA's requirements diverged from prior state law. See *id.*, at 440; *supra*, at 132. Some pre-Act offenders (as defined by SORNA) had never needed to register before; others had once had to register, but had fulfilled their old obligations. And still others (the "lost" or "missing" offenders) should have registered, but had escaped the system. As a result, SORNA created a "practical problem[ ]": It would require "newly registering or reregistering a large number of pre-Act offenders." *Reynolds*, 565 U. S., at 440 (internal quotation marks omitted). And attached to that broad feasibility concern was a more technical one. Recall that under SORNA "a sex offender must initially register before completing his 'sentence of imprisonment.'" *Id.*, at 439 (quoting § 20913(b)); see *supra*, at 133. But many pre-Act offenders were already out of prison, so could not comply with that requirement. That inability raised questions about "how[ ] the new registration requirements applied to them." 565 U. S., at 441. "Congress['s] solution" to both those difficulties was the same: Congress "[a]sk[ed] the Department of Justice, charged with responsibility for implementation, to examine [the issues] and to apply the new registration requirements accordingly." *Ibid.*

On that understanding, the Attorney General's role under § 20913(d) was important but limited: It was to apply SORNA to pre-Act offenders as soon as he thought it feasible to do so. That statutory delegation, the Court explained, would "involve[ ] implementation delay." *Id.*, at 443. But

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reaching that conclusion, the dissent relied on the Act's express statement of purpose and its "sex offender" definition. See *infra*, at 141–143.

no more than that. Congress had made clear in SORNA's text that the new registration requirements would apply to pre-Act offenders. See *id.*, at 442–445. So (the Court continued) "there was no need" for Congress to worry about the "unrealistic possibility" that "the Attorney General would refuse to apply" those requirements on some excessively broad view of his authority under § 20913(d). *Id.*, at 444–445. Reasonably read, SORNA enabled the Attorney General only to address (as appropriate) the "practical problems" involving pre-Act offenders before requiring them to register. *Id.*, at 440. The delegation was a stopgap, and nothing more.[2]

Gundy dismisses *Reynolds*'s relevance, but his arguments come up short. To begin, he contends that *Reynolds* spoke "tentative[ly]"—with "might[s], may[s], or could[s]"—about Congress's reasons for enacting § 20913(d). Reply Brief 11; see *supra*, at 138 (quoting such phrases). Gundy concludes from such constructions—which are indeed present—that the Court was "not offering a definitive reading of the statute." Reply Brief 11. But the Court used those locutions to convey not its own uncertainty but Congress's. The point of the opinion was that Congress had questions about how best to phase SORNA's application to pre-Act offenders, so gave the Attorney General flexibility on timing. The "mights, mays, and coulds" were there to describe the legislative mindset responsible for § 20913(d), and thus formed part of the Court's own—yes, "definitive"—view of that provision's meaning. Anticipating that explanation, Gundy falls back on the claim that the Court's account of Congress's mo-

[2] Once again, the dissent agreed with the Court that § 20913(d) could not sensibly be read to give the Attorney General any greater power. "[I]t is simply implausible," the dissent concluded, "that the Attorney General was given discretion to determine whether coverage of pre-Act offenders (one of the purposes of the Act) should exist." 565 U. S., at 450 (opinion of Scalia, J.). The dissent parted ways with the Court only in interpreting § 20913(d) to provide the Attorney General with even less authority.

tivations "cannot supply the intelligible principle Congress failed to enact into law." *Id.*, at 12 (citing *Whitman*, 531 U. S., at 473). But the Court in *Reynolds* did not invent a standard Congress omitted. Rather, the Court read the statute to contain a standard—again, that the Attorney General should apply SORNA to pre-Act offenders as soon as feasible. And as the next part of this opinion shows, in somewhat greater detail than *Reynolds* thought necessary, we read the statute in the same way.

B

Recall again the delegation provision at issue. Congress gave the Attorney General authority to "specify the applicability" of SORNA's requirements to pre-Act offenders. § 20913(d). And in the second half of the same sentence, Congress gave him authority to "prescribe rules for the registration of any such sex offenders . . . who are unable to comply with" subsection (b)'s initial registration requirement. *Ibid.* What does the delegation in § 20913(d) allow the Attorney General to do?

The different answers on offer here reflect competing views of statutory interpretation. As noted above, Gundy urges us to read § 20913(d) to empower the Attorney General to do whatever he wants as to pre-Act offenders: He may make them all register immediately or he may exempt them from registration forever (or he may do anything in between). See Brief for Petitioner 41–42; *supra*, at 136. Gundy bases that argument on the first half of § 20913(d), isolated from everything else—from the second half of the same section, from surrounding provisions in SORNA, and from any conception of the statute's history and purpose. *Reynolds* took a different approach (as does the Government here), understanding statutory interpretation as a "holistic endeavor" which determines meaning by looking not to isolated words, but to text in context, along with purpose and history. *United Sav. Assn. of Tex.* v. *Tim-*

bers of Inwood Forest Associates, Ltd., 484 U. S. 365, 371 (1988).

This Court has long refused to construe words "in a vacuum," as Gundy attempts. *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *National Assn. of Home Builders* v. *Defenders of Wildlife*, 551 U. S. 644, 666 (2007) (internal quotation marks omitted); see *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 321 (2014) ("[R]easonable statutory interpretation must account for both the specific context in which . . . language is used and the broader context of the statute as a whole" (internal quotation marks omitted)). And beyond context and structure, the Court often looks to "history [and] purpose" to divine the meaning of language. *Maracich* v. *Spears*, 570 U. S. 48, 76 (2013) (internal quotation marks omitted). That non-blinkered brand of interpretation holds good for delegations, just as for other statutory provisions. To define the scope of delegated authority, we have looked to the text in "context" and in light of the statutory "purpose." *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 214, 216 (1943) (internal quotation marks omitted); see *American Power & Light*, 329 U. S., at 104 (stating that the delegation at issue "derive[d] much meaningful content from the purpose of the Act, its factual background and the statutory context"). In keeping with that method, we again do so today.

So begin at the beginning, with the "[d]eclaration of purpose" that is SORNA's first sentence. §20901. There, Congress announced (as *Reynolds* noted, see *supra*, at 137) that "to protect the public," it was "establish[ing] a comprehensive national system for the registration" of "sex offenders and offenders against children." §20901. The term "comprehensive" has a clear meaning—something that is all-encompassing or sweeping. See, *e. g.*, Webster's Third New

International Dictionary 467 (2002) ("covering a matter under consideration completely or nearly completely"); New Oxford American Dictionary 350 (2d ed. 2005) ("complete; including all or nearly all elements or aspects of something"). That description could not fit the system SORNA created if the Attorney General could decline, for any reason or no reason at all, to apply SORNA to all pre-Act offenders. After all, for many years after SORNA's enactment, the great majority of sex offenders in the country would be pre-Act offenders. If Gundy were right, all of those offenders could be exempt from SORNA's registration requirements. So the mismatch between SORNA's statement of purpose and Gundy's view of § 20913(d) is as stark as stark comes. Responding to that patent disparity, Gundy urges us to ignore SORNA's statement of purpose because it is "located in the Act's preface" rather than "tied" specifically to § 20913(d). Brief for Petitioner 46. But the placement of such a statement within a statute makes no difference. See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 220 (2012). Wherever it resides, it is "an appropriate guide" to the "meaning of the [statute's] operative provisions." *Id.*, at 218. And here it makes clear that SORNA was supposed to apply to all pre-Act offenders—which precludes Gundy's construction of § 20913(d).

The Act's definition of "sex offender" (also noted in *Reynolds*, see *supra*, at 137) makes the same point. Under that definition, a "sex offender" is "an individual who was convicted of a sex offense." § 20911(1). Note the tense: "was," not "is." This Court has often "looked to Congress' choice of verb tense to ascertain a statute's temporal reach," including when interpreting other SORNA provisions. *Carr* v. *United States*, 560 U. S. 438, 447–448 (2010) (holding that because SORNA "sets forth [its] travel requirement in the present tense," the statute's criminal penalties do not apply to a person whose interstate travel predated enactment); see, *e. g.*, *United States* v. *Wilson*, 503 U. S. 329, 333 (1992); *Gwalt-*

ney of Smithfield, Ltd. v. *Chesapeake Bay Foundation, Inc.*, 484 U. S. 49, 57 (1987). Here, Congress's use of the past tense to define the term "sex offender" shows that SORNA was not merely forward-looking. The word "is" would have taken care of all future offenders. The word "was" served to bring in the hundreds of thousands of persons previously found guilty of a sex offense, and thought to pose a current threat to the public. The tense of the "sex offender" definition thus confirms that the delegation allows only temporary exclusions, as necessary to address feasibility issues. Contra Gundy, it does not sweep so wide as to make a laughingstock of the statute's core definition.

The Act's legislative history backs up everything said above by showing that the need to register pre-Act offenders was front and center in Congress's thinking. (Once again, the *Reynolds* majority noted this history, but Justice Scalia's dissent thought that was gilding the lily. See *supra*, at 137, and n. 1. He had a point, but we can't resist.) Recall that Congress designed SORNA to address "loopholes and deficiencies" in existing registration laws. See *supra*, at 132. And no problem attracted greater attention than the large number of sex offenders who had slipped the system. According to the House Report, "[t]he most significant enforcement issue in the sex offender program is that over 100,000 sex offenders" are "'missing,' meaning that they have not complied with" then-current requirements. H. R. Rep. No. 109–218, at 26. There is a "strong public interest," the Report continued, in "having [those offenders] register with current information to mitigate the risks of additional crimes against children." *Id.*, at 24. Senators struck a similar chord in the debates preceding SORNA's passage, repeatedly stressing that the new provisions would capture the missing offenders. See, *e. g.*, 152 Cong. Rec. 15338 (2006) (statement of Sen. Kyl) ("The penalties in this bill should be adequate to ensure that [the 100,000 missing offenders] register"); *id.*, at 13050 (statement of Sen. Frist) ("Every day that we don't

have this national sex offender registry, these missing sex predators are out there somewhere"). Imagine how surprising those Members would have found Gundy's view that they had authorized the Attorney General to exempt the missing "predators" from registering at all.

With that context and background established, we may return to § 20913(d). As we have noted, Gundy makes his stand there (and there only), insisting that the lonesome phrase "specify the applicability" ends this case. See *supra*, at 140. But in so doing, Gundy ignores even the rest of the section that phrase is in. Both the title and the remaining text of that section pinpoint one of the "practical problems" discussed above: At the moment of SORNA's enactment, many pre-Act offenders were "unable to comply" with the Act's initial registration requirements. § 20913(d); *Reynolds*, 565 U. S., at 440; see *supra*, at 138. That was because, once again, the requirements assumed that offenders would be in prison, whereas many pre-Act offenders were on the streets. In identifying that issue, § 20913(d) itself reveals the nature of the delegation to the Attorney General. It was to give him the time needed (if any) to address the various implementation issues involved in getting pre-Act offenders into the registration system. "Specify the applicability" thus does not mean "specify *whether* to apply SORNA" to pre-Act offenders at all, even though everything else in the Act commands their coverage. The phrase instead means "specify *how* to apply SORNA" to pre-Act offenders if transitional difficulties require some delay. In that way, the whole of § 20913(d) joins the rest of SORNA in giving the Attorney General only time-limited latitude to excuse pre-Act offenders from the statute's requirements. Under the law, he had to order their registration as soon as feasible.

And no Attorney General has used (or, apparently, thought to use) § 20913(d) in any more expansive way. To the contrary. Within a year of SORNA's enactment (217 days, to

be precise), the Attorney General determined that SORNA would apply immediately to pre-Act offenders. See Interim Rule, 72 Fed. Reg. 8897; *supra*, at 134. That rule has remained in force ever since (save for a technical change to one of the rule's illustrative examples). See Final Rule, 75 Fed. Reg. 81850.[3] And at oral argument here, the Solicitor General's office—rarely in a hurry to agree to limits on the Government's authority—acknowledged that § 20913(d) does not allow the Attorney General to excuse a pre-Act offender from registering, except for reasons of "feasibility." Tr. of Oral Arg. 41–42. We thus end up, on close inspection of the statutory scheme, exactly where *Reynolds* left us. The Attorney General's authority goes to transition-period implementation issues, and no further.

C

Now that we have determined what § 20913(d) means, we can consider whether it violates the Constitution. The question becomes: Did Congress make an impermissible delegation when it instructed the Attorney General to apply SORNA's registration requirements to pre-Act offenders as soon as feasible? Under this Court's long-established law, that question is easy. Its answer is no.

As noted earlier, this Court has held that a delegation is constitutional so long as Congress has set out an "intelligible principle" to guide the delegee's exercise of authority. *J. W. Hampton, Jr., & Co.*, 276 U. S., at 409; see *supra*, at 135–136. Or

[3] Gundy tries to dispute that simple fact, but fails. He points to changes that Attorneys General have made in guidelines to States about how to satisfy SORNA's funding conditions. See Brief for Petitioner 32–33. But those state-directed rules are independent of the only thing at issue here: the application of registration requirements to pre-Act offenders. Those requirements have been constant since the Attorney General's initial rule, as the guidelines themselves affirm. See 73 Fed. Reg. 38046 (2008); 76 Fed. Reg. 1639 (2011). Indeed, the guidelines to States are issued not under § 20913(d) at all, but under a separate delegation in § 20912(b). See 73 Fed. Reg. 38030; 76 Fed. Reg. 1631.

in a related formulation, the Court has stated that a delegation is permissible if Congress has made clear to the delegee "the general policy" he must pursue and the "boundaries of [his] authority." *American Power & Light*, 329 U. S., at 105. Those standards, the Court has made clear, are not demanding. "[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" *Whitman*, 531 U. S., at 474–475 (quoting *Mistretta*, 488 U. S., at 416 (Scalia, J., dissenting)). Only twice in this country's history (and that in a single year) have we found a delegation excessive—in each case because "Congress had failed to articulate *any* policy or standard" to confine discretion. *Mistretta*, 488 U. S., at 373, n. 7 (emphasis added); see *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935). By contrast, we have over and over upheld even very broad delegations. Here is a sample: We have approved delegations to various agencies to regulate in the "public interest." See, *e. g.*, *National Broadcasting Co.*, 319 U. S., at 216; *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24 (1932). We have sustained authorizations for agencies to set "fair and equitable" prices and "just and reasonable" rates. *Yakus*, 321 U. S., at 422, 427; *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944). We more recently affirmed a delegation to an agency to issue whatever air quality standards are "requisite to protect the public health." *Whitman*, 531 U. S., at 472 (quoting 42 U. S. C. § 7409(b)(1)). And so forth.

In that context, the delegation in SORNA easily passes muster (as all eleven circuit courts to have considered the question found, see *supra*, at 134–135). The statute conveyed Congress's policy that the Attorney General require pre-Act offenders to register as soon as feasible. Under the law, the feasibility issues he could address were administrative—and, more specifically, transitional—in nature. Those issues

arose, as *Reynolds* explained, from the need to "newly register[ ] or reregister[ ] 'a large number' of pre-Act offenders" not then in the system. 565 U. S., at 440; see *supra*, at 138. And they arose, more technically, from the gap between an initial registration requirement hinged on imprisonment and a set of pre-Act offenders long since released. See 565 U. S., at 441; see *supra*, at 138. Even for those limited matters, the Act informed the Attorney General that he did not have forever to work things out. By stating its demand for a "comprehensive" registration system and by defining the "sex offenders" required to register to include pre-Act offenders, Congress conveyed that the Attorney General had only temporary authority. Or again, in the words of *Reynolds*, that he could prevent "*instantaneous* registration" and impose some "implementation delay." 565 U. S., at 443. That statutory authority, as compared to the delegations we have upheld in the past, is distinctly small-bore. It falls well within constitutional bounds.[4]

Indeed, if SORNA's delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs. Consider again this Court's long-time recognition: "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta*, 488 U. S., at 372; see *supra*, at 135. Or as the dissent in that case agreed: "[S]ome judgments . . . must be left to the officers executing the law." 488 U. S., at 415 (opinion of Scalia, J.); see *Whitman*, 531 U. S., at 475 ("[A] certain degree of discretion[ ] inheres in most executive" action (internal quotation marks omitted)). Among the judgments often left to executive officials are ones involving fea-

[4] Even Gundy conceded at oral argument that if the statute means what we have said, it "likely would be constitutional." Tr. of Oral Arg. 25. That is why all of his argument is devoted to showing that it means something else.

sibility. In fact, standards of that kind are ubiquitous in the U. S. Code. See, *e. g.*, 12 U. S. C. § 1701z–2(a) (providing that the Secretary of Housing and Urban Development "shall require, to the greatest extent feasible, the employment of new and improved technologies, methods, and materials in housing construction[ ] under [HUD] programs"); 47 U. S. C. § 903(d)(1) (providing that "the Secretary of Commerce shall promote efficient and cost-effective use of the spectrum to the maximum extent feasible" in "assigning frequencies for mobile radio services"). In those delegations, Congress gives its delegee the flexibility to deal with real-world constraints in carrying out his charge. So too in SORNA.

It is wisdom and humility alike that this Court has always upheld such "necessities of government." *Mistretta*, 488 U. S., at 416 (Scalia, J., dissenting) (internal quotation marks omitted); see *ibid.* ("Since Congress is no less endowed with common sense than we are, and better equipped to inform itself of the 'necessities' of government; and since the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political . . . it is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law"). We therefore affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE KAVANAUGH took no part in the consideration or decision of this case.

JUSTICE ALITO, concurring in the judgment.

The Constitution confers on Congress certain "legislative [p]owers," Art. I, § 1, and does not permit Congress to delegate them to another branch of the Government. See *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 472 (2001). Nevertheless, since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions

that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards. See *ibid.*

If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.

Because I cannot say that the statute lacks a discernible standard that is adequate under the approach this Court has taken for many years, I vote to affirm.

JUSTICE GORSUCH, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. It purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens. Yes, those affected are some of the least popular among us. But if a single executive branch official can write laws restricting the liberty of this group of persons, what does that mean for the next?

Today, a plurality of an eight-member Court endorses this extraconstitutional arrangement but resolves nothing. Working from an understanding of the Constitution at war with its text and history, the plurality reimagines the terms of the statute before us and insists there is nothing wrong with Congress handing off so much power to the Attorney General. But JUSTICE ALITO supplies the fifth vote for today's judgment and he does not join either the plurality's constitutional or statutory analysis, indicating instead that he remains willing, in a future case with a full Court, to revisit these matters. Respectfully, I would not wait.

I

For individuals convicted of sex offenses *after* Congress adopted the Sex Offender Registration and Notification Act

(SORNA) in 2006, the statute offers detailed instructions. It requires them "to provide state governments with (and to update) information, such as names and current addresses, for inclusion on state and federal sex offender registries."[1] The law divides offenders into three tiers based on the seriousness of their crimes: Some must register for 15 years, others for 25 years, and still others for life.[2] The statute proceeds to set registration deadlines: Offenders sentenced to prison must register before they're released, while others must register within three business days after sentencing.[3] The statute explains when and how offenders must update their registrations.[4] And the statute specifies particular penalties for failing to comply with its commands.[5] On and on the statute goes for more than 20 pages of the U. S. Code.

But what about those convicted of sex offenses *before* the Act's adoption? At the time of SORNA's enactment, the nation's population of sex offenders exceeded 500,000, and Congress concluded that something had to be done about these "pre-Act" offenders too. But it seems Congress couldn't agree what that should be. The treatment of pre-Act offenders proved a "controversial issue with major policy significance and practical ramifications for states."[6] Among other things, applying SORNA immediately to this group threatened to impose unpopular and costly burdens on States and localities by forcing them to adopt or overhaul their own sex offender registration schemes.[7] So Congress simply passed the problem to the Attorney General. For all half-million pre-Act offenders, the law says only this, in 34 U. S. C. § 20913(d):

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[1] *Reynolds* v. *United States*, 565 U. S. 432, 434 (2012).

[2] 34 U. S. C. §§ 20911, 20915(a).

[3] § 20913(b).

[4] § 20913(c).

[5] § 20913(e).

[6] Logan, The Adam Walsh Act and the Failed Promise of Administrative Federalism, 78 Geo. Wash. L. Rev. 993, 999–1000 (2010).

[7] *Id.*, at 1003–1004.

> "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offender."

Yes, that's it. The breadth of the authority Congress granted to the Attorney General in these few words can only be described as vast. As the Department of Justice itself has acknowledged, SORNA "does not require the Attorney General" to impose registration requirements on pre-Act offenders "within a certain time frame or by a date certain; it does not require him to act at all."[8] If the Attorney General does choose to act, he can require all pre-Act offenders to register, or he can "require some but not all to register."[9] For those he requires to register, the Attorney General may impose "some but not all of [SORNA's] registration requirements," as he pleases.[10] And he is free to change his mind on any of these matters "at any given time or over the course of different [political] administrations."[11] Congress thus gave the Attorney General free rein to write the rules for virtually the entire existing sex offender population in this country—a situation that promised to persist for years or decades until pre-Act offenders passed away or fulfilled the terms of their registration obligations and post-Act offenders came to predominate.

Unsurprisingly, different Attorneys General have exercised their discretion in different ways.[12] For six months after SORNA's enactment, Attorney General Gonzales left past offenders alone. Then the pendulum swung the other direction when the Department of Justice issued an interim

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[8] Brief for United States in *Reynolds* v. *United States*, O. T. 2011, No. 10–6549, p. 23.

[9] *Id.*, at 24.

[10] *Ibid.*

[11] *Ibid.*

[12] See, *e. g.*, 72 Fed. Reg. 8894 (2007); 73 Fed. Reg. 38030 (2008); 76 Fed. Reg. 1639 (2011).

rule requiring pre-Act offenders to follow all the same rules as post-Act offenders.[13] A year later, Attorney General Mukasey issued more new guidelines, this time directing the States to register some but not all past offenders.[14] Three years after that, Attorney General Holder required the States to register only those pre-Act offenders convicted of a new felony after SORNA's enactment.[15] Various Attorneys General have also taken different positions on whether pre-Act offenders might be entitled to credit for time spent in the community before SORNA was enacted.[16]

These unbounded policy choices have profound consequences for the people they affect. Take our case. Before SORNA's enactment, Herman Gundy pleaded guilty in 2005 to a sexual offense. After his release from prison five years later, he was arrested again, this time for failing to register as a sex offender according to the rules the Attorney General had then prescribed for pre-Act offenders. As a result, Mr. Gundy faced an additional 10-year prison term—10 years more than if the Attorney General had, in his discretion, chosen to write the rules differently.

II

A

Our founding document begins by declaring that "We the People . . . ordain and establish this Constitution." At the time, that was a radical claim, an assertion that sovereignty belongs not to a person or institution or class but to the whole of the people. From that premise, the Constitution proceeded to vest the authority to exercise different aspects of the people's sovereign power in distinct entities. In Article I, the Constitution entrusted all of the federal govern-

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[13] 28 CFR § 72.3 (2007); 72 Fed. Reg. 8894.

[14] See 73 Fed. Reg. 38030.

[15] See 76 Fed. Reg. 1639.

[16] Compare 73 Fed. Reg. 38036 (no credit given) with 75 Fed. Reg. 81851 (full credit given).

ment's legislative power to Congress. In Article II, it assigned the executive power to the President. And in Article III, it gave independent judges the task of applying the laws to cases and controversies.

To the framers, each of these vested powers had a distinct content. When it came to the legislative power, the framers understood it to mean the power to adopt generally applicable rules of conduct governing future actions by private persons—the power to "prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,"[17] or the power to "prescribe general rules for the government of society."[18]

The framers understood, too, that it would frustrate "the system of government ordained by the Constitution" if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals.[19] Through the Constitution, after all, the people had vested the power to prescribe rules limiting their liberties in Congress alone. No one, not even Congress, had the right to alter that arrangement. As Chief Justice Marshall explained, Congress may not "delegate . . . powers which are strictly and exclusively legislative."[20] Or as John Locke, one of the thinkers who most influenced the framers' understanding of the separation of powers, described it:

> "The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legis-

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[17] The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton).

[18] *Fletcher* v. *Peck*, 6 Cranch 87, 136 (1810); see also J. Locke, The Second Treatise of Civil Government and a Letter Concerning Toleration §22, p. 13 (1947) (Locke, Second Treatise); 1 W. Blackstone, Commentaries on the Laws of England 44 (1765).

[19] *Marshall Field & Co.* v. *Clark*, 143 U. S. 649, 692 (1892).

[20] *Wayman* v. *Southard*, 10 Wheat. 1, 42–43 (1825).

> lative, and appointing in whose hands that shall be. And when the people have said we will submit to rules, and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorised to make laws for them."[21]

Why did the framers insist on this particular arrangement? They believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty.[22] An "excess of law-making" was, in their words, one of "the diseases to which our governments are most liable."[23] To address that tendency, the framers went to great lengths to make lawmaking difficult. In Article I, by far the longest part of the Constitution, the framers insisted that any proposed law must win the approval of two Houses of Congress—elected at different times, by different constituencies, and for different terms in office—and either secure the President's approval or obtain enough support to override his veto. Some occasionally complain about Article I's detailed and arduous processes for new legislation, but to the framers these were bulwarks of liberty.

Nor was the point only to limit the government's capacity to restrict the people's freedoms. Article I's detailed processes for new laws were also designed to promote deliberation. "The oftener the measure is brought under examination," Hamilton explained, "the greater the diversity in the situations of those who are to examine it," and "the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest."[24]

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[21] Locke, Second Treatise § 141, at 71.

[22] The Federalist No. 48, at 309–312 (J. Madison).

[23] *Id.*, No. 62, at 378. See also *id.*, No. 73, at 441–442 (Hamilton); Locke, Second Treatise § 143.

[24] The Federalist No. 73, at 443.

Other purposes animated the framers' design as well. Because men are not angels[25] and majorities can threaten minority rights, the framers insisted on a legislature composed of different bodies subject to different electorates as a means of ensuring that any new law would have to secure the approval of a supermajority of the people's representatives. This, in turn, assured minorities that their votes would often decide the fate of proposed legislation. Indeed, some even thought a Bill of Rights would prove unnecessary in light of the Constitution's design; in their view, sound structures forcing "[a]mbition [to] . . . counteract ambition" would do more than written promises to guard unpopular minorities from the tyranny of the majority.[26] Restricting the task of legislating to one branch characterized by difficult and deliberative processes was also designed to promote fair notice and the rule of law, ensuring the people would be subject to a relatively stable and predictable set of rules.[27] And by directing that legislating be done only by elected representatives in a public process, the Constitution sought to ensure that the lines of accountability would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow.[28]

If Congress could pass off its legislative power to the executive branch, the "[v]esting [c]lauses, and indeed the entire structure of the Constitution," would "make no sense."[29] Without the involvement of representatives from across the country or the demands of bicameralism and presentment, legislation would risk becoming nothing more than the will of the current President. And if laws could be simply de-

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[25] *Id.*, No. 51, at 322 (Madison); D. Schoenbrod, Power Without Responsibility 29 (1993) (Schoenbrod).

[26] The Federalist No. 51, at 322. See also *id.*, No. 84, at 515 (Hamilton).

[27] *Id.*, No. 62, at 378–380.

[28] Schoenbrod 99; see also The Federalist No. 50, at 316 (Madison).

[29] Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 340 (2002).

cleared by a single person, they would not be few in number, the product of widespread social consensus, likely to protect minority interests, or apt to provide stability and fair notice.[30] Accountability would suffer too. Legislators might seek to take credit for addressing a pressing social problem by sending it to the executive for resolution, while at the same time blaming the executive for the problems that attend whatever measures he chooses to pursue. In turn, the executive might point to Congress as the source of the problem. These opportunities for finger-pointing might prove temptingly advantageous for the politicians involved, but they would also threaten to "'disguise . . . responsibility for . . . the decisions.'"[31]

The framers warned us against permitting consequences like these. As Madison explained, "'[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.'"[32] The framers knew, too, that the job of keeping the legislative power confined to the legislative branch couldn't be trusted to self-policing by Congress; often enough, legislators will face rational incentives to pass problems to the executive branch. Besides, enforcing the separation of powers isn't about protecting institutional prerogatives or governmental turf. It's about respecting the people's sovereign choice to vest the legislative power in Congress alone. And it's about safeguarding a structure designed to protect their liberties, minority rights, fair notice, and the rule of law. So when a case or controversy comes within the judicial competence,

[30] The Federalist No. 47, at 303 (Madison); *id.*, No. 62, at 378 (same).

[31] Rao, Administrative Collusion: How Delegation Diminishes the Collective Congress, 90 N. Y. U. L. Rev. 1463, 1478 (2015). See also B. Iancu, Legislative Delegation: The Erosion of Normative Limits in Modern Constitutionalism 87 (2012).

[32] The Federalist No. 47, at 302 (Madison). Accord, 1 Blackstone, Commentaries on the Laws of England, at 142; see also Cass, Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State, 40 Harv. J. L. & Pub. Pol'y 147, 153 (2016).

the Constitution does not permit judges to look the other way; we must call foul when the constitutional lines are crossed. Indeed, the framers afforded us independence from the political branches in large part to encourage exactly this kind of "fortitude . . . to do [our] duty as faithful guardians of the Constitution."[33]

B

Accepting, then, that we have an obligation to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities, the question follows: What's the test? Madison acknowledged that "no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary."[34] Chief Justice Marshall agreed that policing the separation of powers "is a subject of delicate and difficult inquiry."[35] Still, the framers took this responsibility seriously and offered us important guiding principles.

First, we know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to "fill up the details." In *Wayman* v. *Southard*, this Court upheld a statute that instructed the federal courts to borrow state-court procedural rules but allowed them to make certain "alterations and additions." Writing for the Court, Chief Justice Marshall distinguished between those "important subjects, which must be entirely regulated by the legislature itself," and "those of less interest, in which a general provision may be made, and power given to those who are to act . . . to fill up the details."[36] The Court upheld the statute before it because Congress had announced the controlling general policy when it ordered federal courts to follow state procedures, and the residual

[33] The Federalist No. 78, at 470.
[34] *Id.*, No. 37, at 228 (Madison).
[35] *Wayman*, 10 Wheat., at 46.
[36] *Id.*, at 31, 43.

authority to make "alterations and additions" did no more than permit courts to fill up the details.

Later cases built on Chief Justice Marshall's understanding. In *In re Kollock*, for example, the Court upheld a statute that assigned the Commissioner of Internal Revenue the responsibility to design tax stamps for margarine packages.[37] Later still, and using the same logic, the Court sustained other and far more consequential statutes, like a law authorizing the Secretary of Agriculture to adopt rules regulating the "use and occupancy" of public forests to protect them from "destruction" and "depredations."[38] Through all these cases, small or large, runs the theme that Congress must set forth standards "sufficiently definite and precise to enable Congress, the courts, and the public to ascertain" whether Congress's guidance has been followed.[39]

Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding. Here, too, the power extended to the executive may prove highly consequential. During the Napoleonic Wars, for example, Britain and France each tried to block the United States from trading with the other. Congress responded with a statute instructing that, if the President found that either Great Britain or France stopped interfering with American trade, a trade embargo would be imposed against the other country. In *Cargo of Brig Aurora* v. *United States*, this Court explained that it could "see no sufficient reason, why the legislature should not exercise its discretion [to impose an embargo] either expressly or *conditionally*, as their judgment should direct."[40] Half a cen-

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[37] 165 U. S. 526, 532 (1897).

[38] *United States* v. *Grimaud*, 220 U. S. 506, 522 (1911). See also *Buttfield* v. *Stranahan*, 192 U. S. 470, 496 (1904); *ICC* v. *Goodrich Transit Co.*, 224 U. S. 194, 210, 215 (1912).

[39] *Yakus* v. *United States*, 321 U. S. 414, 426 (1944).

[40] 7 Cranch 382, 388 (1813) (emphasis added).

tury later, Congress likewise made the construction of the Brooklyn Bridge depend on a finding by the Secretary of War that the bridge wouldn't interfere with navigation of the East River. The Court held that Congress "did not abdicate any of its authority" but "simply declared that, upon a certain fact being established, the bridge should be deemed a lawful structure, and employed the secretary of war as an agent to ascertain that fact."[41]

Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities. While the Constitution vests all federal legislative power in Congress alone, Congress's legislative authority sometimes overlaps with authority the Constitution separately vests in another branch.[42] So, for example, when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if "the discretion is to be exercised over matters already within the scope of executive power."[43] Though the case was decided on different grounds, the foreign-affairs-related statute in *Cargo of the Brig Aurora* may be an example of this kind of permissible lawmaking, given that many foreign affairs powers are constitutionally vested in the president under Article II. *Wayman* itself might be explained by the same principle as applied to the judiciary: Even in the absence of any statute, courts have the power under Article III "to regulate their practice."[44]

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[41] *Miller* v. *Mayor of New York*, 109 U. S. 385, 393 (1883).

[42] See *Loving* v. *United States*, 517 U. S. 748, 768 (1996); *id.*, at 776 (Scalia, J., concurring in part and concurring in judgment); *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 320 (1936); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring).

[43] Schoenbrod, The Delegation Doctrine: Could the Court Give It Substance? 83 Mich. L. Rev. 1223, 1260 (1985).

[44] 10 Wheat., at 43.

C

Before the 1930s, federal statutes granting authority to the executive were comparatively modest and usually easily upheld. But then the federal government began to grow explosively. And with the proliferation of new executive programs came new questions about the scope of congressional delegations. Twice the Court responded by striking down statutes for violating the separation of powers.

In *A. L. A. Schechter Poultry Corp.* v. *United States*, the Court considered a statute that transferred to the President the power "to approve 'codes of fair competition' " for slaughterhouses and other industries.[45] But Congress offered no meaningful guidance. It did not, for example, reference any pre-existing common law of fair competition that might have supplied guidance on the policy questions, as it arguably had done earlier with the Sherman Act.[46] And it did not announce rules contingent on executive fact-finding. Nor was this assigned power one that anyone thought might inhere in the executive power. Proceeding without the need to convince a majority of legislators, the President adopted a lengthy fair competition code written by a group of (possibly self-serving) New York poultry butchers.

Included in the code was a rule that often made it a federal crime for butchers to allow customers to select which individual chickens they wished to buy. Kosher butchers such as the Schechters had a hard time following these rules. Yet the government apparently singled out the Schechters as a test case; inspectors repeatedly visited them and, at times, apparently behaved abusively toward their customers. When the Schechters finally kicked the inspectors out, they

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[45] 295 U. S. 495, 521–522 (1935).

[46] See *State Oil Co.* v. *Khan*, 522 U. S. 3, 21 (1997); *National Soc. of Professional Engineers* v. *United States*, 435 U. S. 679, 688 (1978); Letwin, The English Common Law Concerning Monopolies, 21 U. Chi. L. Rev. 355 (1954).

were greeted with a criminal indictment running to dozens of counts. After a trial in which the Schechters were found guilty of selling one allegedly "unfit" chicken and other miscellaneous counts,[47] this Court agreed to hear the case and struck down the law as a violation of the separation of powers. If Congress could permit the President to write a new code of fair competition all his own, Justice Cardozo explained, then "anything that Congress may do within the limits of the commerce clause for the betterment of business [could] be done by the President . . . by calling it a code. This is delegation running riot."[48]

The same year, in *Panama Refining Co.* v. *Ryan*, the Court struck down a statute that authorized the President to decide whether and how to prohibit the interstate transportation of "'hot oil,'" petroleum produced or withdrawn from storage in excess of state-set quotas. As in *Schechter Poultry*, the law provided no notice to regulated parties about what the President might wind up prohibiting, leading the Court to observe that Congress "ha[d] declared no policy, ha[d] established no standard, ha[d] laid down no rule."[49] The Court explained that the statute did not call for the executive to "ascertai[n] the existence of facts to which legislation is directed."[50] Nor did it ask the executive to "'fill up the details'" "within the framework of the policy which the legislature has sufficiently defined."[51] "If [the statute] were held valid," the Court continued, "it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function."[52]

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[47] See A. Shlaes, The Forgotten Man: A New History of the Great Depression 214–225 (2007).

[48] *Schechter Poultry*, 295 U. S., at 553 (concurring opinion).

[49] *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 415, 418, 430 (1935).

[50] *Id.*, at 426.

[51] *Id.*, at 426 (quoting *Wayman*, 10 Wheat., at 43); 293 U. S., at 429.

[52] *Id.*, at 430.

After *Schechter Poultry* and *Panama Refining*, Congress responded by writing a second wave of New Deal legislation more "[c]arefully crafted" to avoid the kind of problems that sank these early statutes.[53] And since that time the Court hasn't held another statute to violate the separation of powers in the same way. Of course, no one thinks that the Court's quiescence can be attributed to an unwavering new tradition of more scrupulously drawn statutes. Some lament that the real cause may have to do with a mistaken "case of death by association" because *Schechter Poultry* and *Panama Refining* happened to be handed down during the same era as certain of the Court's now-discredited substantive due process decisions.[54] But maybe the most likely explanation of all lies in the story of the evolving "intelligible principle" doctrine.

This Court first used that phrase in 1928 in *J. W. Hampton, Jr., & Co.* v. *United States*, where it remarked that a statute "lay[ing] down by legislative act an intelligible principle to which the [executive official] is directed to conform" satisfies the separation of powers.[55] No one at the time thought the phrase meant to effect some revolution in this Court's understanding of the Constitution. While the exact line between policy and details, lawmaking and fact-finding, and legislative and non-legislative functions had sometimes invited reasonable debate, everyone agreed these were the relevant inquiries. And when Chief Justice Taft wrote of an "intelligible principle," it seems plain enough that he sought only to explain the operation of these traditional tests; he gave no hint of a wish to overrule or revise them. Tellingly, too, he wrote the phrase seven years before *Schechter Poultry* and *Panama Refining*, and it did nothing to alter the

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[53] M. McKenna, Franklin Roosevelt and the Great Constitutional War: The Court-Packing Crisis of 1937, p. 424 (2002).

[54] J. Ely, Democracy and Distrust: A Theory of Judicial Review 133 (1980).

[55] 276 U. S. 394, 409 (1928).

analysis in those cases, let alone prevent those challenges from succeeding by lopsided votes.

There's a good argument, as well, that the statute in *J. W. Hampton* passed muster under the traditional tests. To boost American competitiveness in international trade, the legislation directed the President to "'investigat[e]'" the relative costs of production for American companies and their foreign counterparts and impose tariffs or duties that would "'equalize'" those costs.[56] It also offered guidance on how to determine costs of production, listing several relevant factors and establishing a process for interested parties to submit evidence.[57] The President's fact-finding responsibility may have required intricate calculations, but it could be argued that Congress had made all the relevant policy decisions, and the Court's reference to an "intelligible principle" was just another way to describe the traditional rule that Congress may leave the executive the responsibility to find facts and fill up details.[58]

Still, it's undeniable that the "intelligible principle" remark eventually began to take on a life of its own. We sometimes chide people for treating judicial opinions as if they were statutes, divorcing a passing comment from its context, ignoring all that came before and after, and treating an isolated phrase as if it were controlling.[59] But that seems to be exactly what happened here. For two decades, no one thought to invoke the "intelligible principle" comment as a basis to uphold a statute that would have failed more traditional separation-of-powers tests. In fact, the phrase sat more or less silently entombed until the late 1940s. Only then did lawyers begin digging it up in earnest and arguing

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[56] *Id.*, at 401.

[57] *Id.*, at 401–402.

[58] But see *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 79, 82, and n. 4 (2015) (THOMAS, J., concurring in judgment).

[59] See, *e. g.*, *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 341 (1979).

to this Court that it had somehow displaced (*sub silentio* of course) all prior teachings in this area.[60]

This mutated version of the "intelligible principle" remark has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked. Judges and scholars representing a wide and diverse range of views have condemned it as resting on "misunderst[ood] historical foundations."[61] They have explained, too, that it has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional. Indeed, where some have claimed to see "intelligible principles" many "less discerning readers [have been able only to] find gibberish."[62] Even Justice Douglas, one

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[60] See, *e. g.*, *Lichter* v. *United States*, 334 U. S. 742, 785 (1948) (upholding a statute authorizing the executive to define "'excessive profits'" earned by military contractors on the basis that the statute contained an "'intelligible principle'").

[61] *Association of American Railroads*, 575 U. S., at 82 (THOMAS, J., concurring in judgment). See also n. 62, *infra* (collecting sources).

[62] Lawson, 88 Va. L. Rev., at 329. See also *Mistretta* v. *United States*, 488 U. S. 361, 415–417 (1989) (Scalia, J., dissenting); Ely, *supra*, at 132 ("[B]y refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic"); Wright, Beyond Discretionary Justice, 81 Yale L. J. 575, 583 (1972) ("[T]he delegation doctrine retains an important potential as a check on the exercise of unbounded, standardless discretion by administrative agencies"); *Michigan Gambling Opposition* v. *Kempthorne*, 525 F. 3d 23, 34 (CADC 2008) (Brown, J., dissenting) ("[The majority] conjures standards and limits from thin air to construct a supposed intelligible principle") (collecting cases); Schoenbrod, 83 Mich. L. Rev., at 1231 ("[T]he [intelligible principle] test has become so ephemeral and elastic as to lose its meaning"); Schwartz, Of Administrators and Philosopher-Kings: The Republic, the Laws, and Delegations of Power, 72 Nw. U. L. Rev. 443, 446 (1977) ("[T]he requirement of defined standards has . . . become all but a vestigial euphemism"); P. Hamburger, Is Administrative Law Unlawful? 378 (2014) ("[T]he notion of an 'intelligible principle' sets a ludicrously low standard for what Congress must supply"); M. Redish, The Constitution as Political Structure 138–139 (1995); Gewirtz, The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines, 40 Law & Contemp. Prob., pt. 2,

of the fathers of the administrative state, came to criticize excessive congressional delegations in the period when the intelligible principle "test" began to take hold.[63]

Still, the scope of the problem can be overstated. At least some of the results the Court has reached under the banner of the abused "intelligible principle" doctrine may be consistent with more traditional teachings. Some delegations have, at least arguably, implicated the president's inherent Article II authority. The Court has held, for example, that Congress may authorize the President to prescribe aggravating factors that permit a military court-martial to impose the death penalty on a member of the Armed Forces convicted of murder—a decision that may implicate in part the President's independent commander-in-chief authority.[64] Others of these cases may have involved laws that specified rules governing private conduct but conditioned the application of those rules on fact-finding—a practice that is, as we've seen, also long associated with the executive function.[65]

More recently, too, we've sought to tame misunderstandings of the intelligible principle "test." In *Touby* v. *United*

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pp. 46, 50–51 (Summer 1976); McGowan, Congress, Court, and Control of Delegated Power, 77 Colum. L. Rev. 1119, 1127–1128, and n. 33 (1977).

[63] "Washington, D. C., is filled with lobbyists for every special interest that is trying to make a fast buck out of some piece of the public domain. . . . In the thirties and forties I had viewed the creation of an agency as the solution of a problem. I learned that agencies soon became spokesmen for the status quo, that few had the guts to carry through the reforms assigned to them. I also realized that Congress defaulted when it left it up to an agency to do what the 'public interest' indicated should be done. 'Public interest' is too vague a standard to be left to free-wheeling administrators. They should be more closely confined to specific ends or goals." W. Douglas, Go East, Young Man 216–217 (1974).

[64] *Loving*, 517 U. S., at 771–774.

[65] See, *e. g.*, *Skinner* v. *Mid-America Pipeline Co.*, 490 U. S. 212, 215, 219–220 (1989) (statute directing Secretary of Transportation to establish pipeline safety user fees " 'sufficient to meet the costs of [specified] activities' " but not " 'exceed[ing] 105 percent of the aggregate of appropriations made for such fiscal year for activities to be funded by such fees' ").

States, the Court considered a provision of the Controlled Substances Act that allowed the Attorney General to add a substance to a list of prohibited drugs temporarily if he determined that doing so was "'necessary to avoid an imminent hazard to the public safety.'"[66] Notably, Congress required the Attorney General, before acting, to consider the drug's "'history and current pattern of abuse,'" the "'scope, duration, and significance of [that] abuse,'" and "'[w]hat, if any, risk there is to the public health.'"[67] In approving the statute, the Court stressed all these constraints on the Attorney General's discretion and, in doing so, seemed to indicate that the statute supplied an "intelligible principle" *because* it assigned an essentially fact-finding responsibility to the executive. Whether or not one agrees with its characterization of the statute, in proceeding as it did *Touby* may have at least begun to point us back in the direction of the right questions. To determine whether a statute provides an intelligible principle, we must ask: Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands.

While it's been some time since the Court last held that a statute improperly delegated the legislative power to another branch—thanks in no small measure to the intelligible principle misadventure—the Court has hardly abandoned the business of policing improper legislative delegations. When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different

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[66] 500 U. S. 160, 166 (1991).

[67] *Ibid.*

doctrines.[68] And that's exactly what's happened here. We still regularly rein in Congress's efforts to delegate legislative power; we just call what we're doing by different names.

Consider, for example, the "major questions" doctrine. Under our precedents, an agency can fill in statutory gaps where "statutory circumstances" indicate that Congress meant to grant it such powers.[69] But we don't follow that rule when the "statutory gap" concerns "a question of deep 'economic and political significance' that is central to the statutory scheme."[70] So we've rejected agency demands that we defer to their attempts to rewrite rules for billions of dollars in healthcare tax credits,[71] to assume control over millions of small greenhouse gas sources,[72] and to ban cigarettes.[73] Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.

Consider, too, this Court's cases addressing vagueness. "A vague law," this Court has observed, "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis."[74] And we have explained that our doctrine prohibiting vague laws is

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[68] See, *e. g.*, *McDonald* v. *Chicago*, 561 U. S. 742, 758 (2010) (incorporating the Second Amendment through the Due Process Clause instead of the Privileges or Immunities Clause).

[69] *United States* v. *Mead Corp.*, 533 U. S. 218, 229 (2001).

[70] *King* v. *Burwell*, 576 U. S. 473, 486 (2015).

[71] *Ibid.*

[72] *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 324 (2014).

[73] *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 159–160 (2000).

[74] *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–109 (1972); see *Kolender* v. *Lawson*, 461 U. S. 352, 358, n. 7 (1983); *Sessions* v. *Dimaya*, 584 U. S. 148, 181–183 (2018) (GORSUCH, J., concurring in part and concurring in judgment).

an outgrowth and "corollary of the separation of powers."[75] It's easy to see, too, how most any challenge to a legislative delegation can be reframed as a vagueness complaint: A statute that does not contain "sufficiently definite and precise" standards "to enable Congress, the courts, and the public to ascertain" whether Congress's guidance has been followed at once presents a delegation problem and provides impermissibly vague guidance to affected citizens.[76] And it seems little coincidence that our void-for-vagueness cases became much more common soon after the Court began relaxing its approach to legislative delegations. Before 1940, the Court decided only a handful of vagueness challenges to federal statutes. Since then, the phrase "void for vagueness" has appeared in our cases well over 100 times.

Nor have we abandoned enforcing other sides of the separation-of-powers triangle between the legislative, executive, and judiciary. We have not hesitated to prevent Congress from "confer[ring] the Government's 'judicial Power' on entities outside Article III."[77] We've forbidden the executive from encroaching on legislative functions by wielding a line-item veto.[78] We've prevented Congress from delegating its collective legislative power to a single House.[79] And we've policed legislative efforts to control executive branch officials.[80] These cases show that, when the separation of powers is at stake, we don't just throw up our hands. In all these areas, we recognize that abdication is "not part of the constitutional design."[81] And abdication here would be no

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[75] *Id.*, at 156 (opinion of KAGAN, J.).

[76] *Yakus*, 321 U. S., at 426.

[77] *Stern* v. *Marshall*, 564 U. S. 462, 484 (2011); *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 225–226 (1995).

[78] *Clinton* v. *City of New York*, 524 U. S. 417, 449 (1998).

[79] *INS* v. *Chadha*, 462 U. S. 919 (1983).

[80] *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 496–497 (2010); *Lucia* v. *SEC*, 585 U. S. 237 (2018).

[81] *Clinton*, 524 U. S., at 452 (Kennedy, J., concurring).

more appropriate. To leave this aspect of the constitutional structure alone undefended would serve only to accelerate the flight of power from the legislative to the executive branch, turning the latter into a vortex of authority that was constitutionally reserved for the people's representatives in order to protect their liberties.

III

A

Returning to SORNA with this understanding of our charge in hand, problems quickly emerge. Start with this one: It's hard to see how SORNA leaves the Attorney General with only details to fill up. Of course, what qualifies as a detail can sometimes be difficult to discern and, as we've seen, this Court has upheld statutes that allow federal agencies to resolve even highly consequential details so long as Congress prescribes the rule governing private conduct. But it's hard to see how the statute before us could be described as leaving the Attorney General with only details to dispatch. As the government itself admitted in *Reynolds*, SORNA leaves the Attorney General free to impose on 500,000 pre-Act offenders all of the statute's requirements, some of them, or none of them. The Attorney General may choose which pre-Act offenders to subject to the Act. And he is free to change his mind at any point or over the course of different political administrations. In the end, there isn't a single policy decision concerning pre-Act offenders on which Congress even tried to speak, and not a single other case where we have upheld executive authority over matters like these on the ground they constitute mere "details." This much appears to have been deliberate, too. Because members of Congress could not reach consensus on the treatment of pre-Act offenders, it seems this was one of those situations where they found it expedient to hand off the job to the executive and direct there the blame for any later problems that might emerge.

Nor can SORNA be described as an example of conditional legislation subject to executive fact-finding. To be sure, Congress could have easily written this law in that way. It might have required all pre-Act offenders to register, but then given the Attorney General the authority to make case-by-case exceptions for offenders who do not present an "'imminent hazard to the public safety'" comparable to that posed by newly released post-Act offenders.[82] It could have set criteria to inform that determination, too, asking the executive to investigate, say, whether an offender's risk of recidivism correlates with the time since his last offense, or whether multiple lesser offenses indicate higher or lower risks than a single greater offense.

But SORNA did none of this. Instead, it gave the Attorney General unfettered discretion to decide which requirements to impose on which pre-Act offenders. The Attorney General's own edicts acknowledge the considerable policy-making powers he enjoys, describing his rules governing pre-Act offenders as "'of fundamental importance to the initial operation of SORNA, and to its practical scope . . . since [they] determin[e] the applicability of SORNA's requirements to virtually the entire existing sex offender population.'"[83] These edicts tout, too, the Attorney General's "discretion to apply SORNA's requirements to sex offenders with pre-SORNA convictions if he determines (as he has) that the public benefits of doing so outweigh any adverse effects."[84] Far from deciding the factual predicates to a rule set forth by statute, the Attorney General himself acknowledges that the law entitles him to make his own policy decisions.

Finally, SORNA does not involve an area of overlapping authority with the executive. Congress may assign the President broad authority regarding the conduct of foreign affairs or other matters where he enjoys his own inherent

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[82] Cf. *Touby*, 500 U. S., at 166.

[83] 75 Fed. Reg. 81850 (quoting 72 Fed. Reg. 8896).

[84] 75 Fed. Reg. 81850.

Article II powers. But SORNA stands far afield from any of that. It gives the Attorney General the authority to "prescrib[e] the rules by which the duties and rights" of citizens are determined, a quintessentially legislative power.[85]

Our precedents confirm these conclusions. If allowing the President to draft a "cod[e] of fair competition" for slaughterhouses was "delegation running riot," then it's hard to see how giving the nation's chief prosecutor the power to write a criminal code rife with his own policy choices might be permissible.[86] And if Congress may not give the President the discretion to ban or allow the interstate transportation of petroleum, then it's hard to see how Congress may give the Attorney General the discretion to apply or not apply any or all of SORNA's requirements to pre-Act offenders, and then change his mind at any time.[87] If the separation of powers means anything, it must mean that Congress cannot give the executive branch a blank check to write a code of conduct governing private conduct for a half-million people.

The statute here also sounds all the alarms the founders left for us. Because Congress could not achieve the consensus necessary to resolve the hard problems associated with SORNA's application to pre-Act offenders, it passed the potato to the Attorney General. And freed from the need to assemble a broad supermajority for his views, the Attorney General did not hesitate to apply the statute retroactively to a politically unpopular minority. Nor could the Attorney General afford the issue the kind of deliberative care the framers designed a representative legislature to ensure. Perhaps that's part of the reason why the executive branch found itself rapidly adopting different positions across different administrations. And because SORNA vested lawmaking power in one person rather than many, it should be no

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[85] The Federalist No. 78, at 465 (Hamilton); see also Part II–A, *supra*.

[86] *Schechter Poultry*, 295 U. S., at 552–553 (Cardozo, J., concurring).

[87] *Panama Refining*, 293 U. S., at 430.

surprise that, rather than few and stable, the edicts have proved frequent and shifting, with fair notice sacrificed in the process. Then, too, there is the question of accountability. In passing this statute, Congress was able to claim credit for "comprehensively" addressing the problem of the entire existing population of sex offenders (who can object to that?), while in fact leaving the Attorney General to sort it out.

It would be easy enough to let this case go. After all, sex offenders are one of the most disfavored groups in our society. But the rule that prevents Congress from giving the executive *carte blanche* to write laws for sex offenders is the same rule that protects everyone else. Nor is it hard to imagine how the power at issue in this case—the power of a prosecutor to require a group to register with the government on pain of weighty criminal penalties—could be abused in other settings. To allow the nation's chief law enforcement officer to write the criminal laws he is charged with enforcing—to "'unit[e]'" the "'legislative and executive powers . . . in the same person'"—would be to mark the end of any meaningful enforcement of our separation of powers and invite the tyranny of the majority that follows when lawmaking and law enforcement responsibilities are united in the same hands.[88]

Nor would enforcing the Constitution's demands spell doom for what some call the "administrative state." The separation of powers does not prohibit any particular policy outcome, let alone dictate any conclusion about the proper size and scope of government. Instead, it is a procedural guarantee that requires Congress to assemble a social consensus before choosing our nation's course on policy questions like those implicated by SORNA. What is more, Congress is hardly bereft of options to accomplish all it might wish to achieve. It may always authorize executive branch

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[88] The Federalist No. 47, at 302.

officials to fill in even a large number of details, to find facts that trigger the generally applicable rule of conduct specified in a statute, or to exercise non-legislative powers. Congress can also commission agencies or other experts to study and recommend legislative language. Respecting the separation of powers forecloses no substantive outcomes. It only requires us to respect along the way one of the most vital of the procedural protections of individual liberty found in our Constitution.

B

What do the government and the plurality have to say about the constitutional concerns SORNA poses? Most everyone, the plurality included, concedes that if SORNA allows the Attorney General as much authority as we have outlined, it would present "a nondelegation question."[89] So the only remaining available tactic is to try to make this big case "small-bore"[90] by recasting the statute in a way that might satisfy any plausible separation-of-powers test. So, yes, just a few years ago in *Reynolds* the government represented to this Court that SORNA granted the Attorney General nearly boundless discretion with respect to pre-Act offenders. But *now*, faced with a constitutional challenge, the government speaks out of the other side of its mouth and invites us to reimagine SORNA as compelling the Attorney General to register pre-Act offenders "to the maximum extent feasible." And, as thus reinvented, the government insists, the statute supplies a clear statement of legislative policy, with only details for the Attorney General to clean up.

But even this new dream of a statute wouldn't be free from doubt. A statute directing an agency to regulate private conduct to the extent "feasible" can have many possible meanings: It might refer to "technological" feasibility, "economic" feasibility, "administrative" feasibility, or even "polit-

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[89] *Ante*, at 136.

[90] *Ante*, at 147.

ical" feasibility. Such an "evasive standard" could threaten the separation of powers if it effectively allowed the agency to make the "important policy choices" that belong to Congress while frustrating "meaningful judicial review."[91] And that seems exactly the case here, where the Attorney General is left free to make all the important policy decisions and it is difficult to see what standard a court might later use to judge whether he exceeded the bounds of the authority given to him.

But don't worry over that; return to the real world. The bigger problem is that the feasibility standard is a figment of the government's (very recent) imagination. The only provision addressing pre-Act offenders, § 20913(d), says *nothing* about feasibility. And the omission can hardly be excused as some oversight: No one doubts that Congress knows exactly how to write a feasibility standard into law when it wishes.[92] Unsurprisingly, too, the existence of some imaginary statutory feasibility standard seemed to have escaped notice at the Department of Justice during the Attorney General's many rulemakings; in those proceedings, as we have seen, the Attorney General has repeatedly admitted that the statute affords him the authority to "balance" the burdens on sex offenders with "public safety interests" as and how he sees fit.[93]

Unable to muster a feasibility standard from the only statutory provision addressing pre-Act offenders, the plurality invites us to hunt in other and more unlikely corners. It points first to SORNA's "[d]eclaration of purpose," which announces that Congress, "[i]n order to protect the public from sex offenders and offenders against children . . . establishes a comprehensive national system for the registration of those

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[91] *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607, 676, 685–686 (1980) (Rehnquist, J., concurring in judgment).

[92] See, *e. g.*, 42 U. S. C. §§ 1310(b)(2)(C), 1383b(e)(2)(B); 20 U. S. C. § 3509; 49 U. S. C. § 24201(a)(1).

[93] 75 Fed. Reg. 81851–81852.

offenders."[94] But nowhere is feasibility mentioned here either. In fact, this provision doesn't purport to guide the Attorney General's discretion at all. Instead, it simply declares what Congress believed the *rest* of the statute's enacted provisions had already "establishe[d]," without the need for any action by the Attorney General. And by now surely we must all agree that broad and sweeping statements like these about "a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the specific issue under consideration."[95] While those adopting SORNA might have declared that they hoped and wished for a "comprehensive national system," the fact remains that the law they actually adopted for pre-Act offenders leaves everything to the Attorney General. Hopes and dreams are not laws.

Besides, even if we were to pretend that § 20901 amounted to a directive *telling* the Attorney General to establish a "comprehensive national system" for pre-Act offenders, the plurality reads too much into the word "comprehensive." Comprehensive coverage does not mean coverage to the maximum extent feasible. "Comprehensive" means "having the attribute of comprising or including much; of large content or scope," "[i]nclusive of; embracing," or "[c]ontaining much in small compass; compendious."[96] So, for example, a criminal justice system may be called "comprehensive" even though many crimes go unpursued. And SORNA itself contains all sorts of coverage exceptions for *post-Act* offenders yet claims to comprehensively address them.[97] In the same way, no reason exists why SORNA might not also claim to address pre-Act offenders "comprehensively" even though the Attorney General is free to exercise his discretion to

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[94] 34 U. S. C. § 20901. See also *ante*, at 141–142.

[95] *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 261 (1993) (emphasis deleted).

[96] 3 Oxford English Dictionary 632 (2d ed. 1989).

[97] See, *e. g.*, 34 U. S. C. §§ 20911(7)(A)–(B), (8), 20915(a), (b)(1).

forgo registration for some, many, or maybe all of them. The statute still "comprehensively" addresses these persons by indicating they must abide whatever rules an Attorney General may choose. In all these ways, SORNA might be said to address sex offenders past, present, and future in a way that "compris[es] or includ[es] much," and that is "of large content or scope," but in a way that nevertheless delegates important policy decisions to the executive branch.

Finding it impossible to conscript the statute's declaration of purpose into doing the work it needs done, the government and plurality next ask us to turn to SORNA's definition of "'sex offender.'"[98] They emphasize that SORNA defines a "sex offender" as "'an individual who *was* convicted of a sex offense'"—and, they note, pre-Act offenders meet this definition.[99] Because pre-Act offenders fall within the definition of "sex offender[s]," the government and plurality continue, it follows that the Attorney General must ensure all of them are registered and subject to SORNA's demands.

That much, however, does not follow. To say that pre-Act sex offenders fall within the definition of "sex offenders" is merely a truism: Yes, of course, these people have already been convicted of sex offenses under state law. But whether these individuals are *also* subject to federal registration requirements is a different question entirely. And as we have seen, the only part of the statute that speaks to pre-Act sex offenders—§ 20913(d)—makes plain that they are *not* automatically subject to all the Act's terms but are left to their fate at the hands of the Attorney General. Look at it this way: If the statute's definitional section were really enough to command the registration of all sex offenders, the Act would have had no need to proceed to explain, as it does at great length, when *post*-Act sex offenders must register and when they need not.

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[98] *Ante*, at 142–143.

[99] *Ibid.*

If that argument won't work, the plurality points us to § 20913(d)'s second clause, which grants the Attorney General the authority "to prescribe rules for the registration of . . . sex offenders . . . who are unable to comply" with the Act's initial registration requirements.[100] According to the plurality, this language suggests that Congress expected the Attorney General to register pre-Act offenders to the maximum extent feasible. But, of course, this clause, too, says nothing of the sort. And the authority provided under § 20913(d)'s *first* clause—which gives the Attorney General the blanket authority "to specify the applicability of the requirements of this subchapter"—is *additional to* the authority granted under the *second* clause. So not only does the Attorney General have the authority to prescribe rules for the registration of pre-Act offenders under the second clause, he is free to specify which statutory requirements he does and does not wish to apply under the first clause. Far from suggesting a maximalist approach then, the second clause read in light of the first only serves to underscore the breadth of the Attorney General's discretion.

With so little in statutory text to work with, the government and the plurality "can't resist" highlighting certain statements from the Act's legislative history.[101] But "legislative history is not the law."[102] Still less can committee reports or statements by individual legislators be used "to muddy clear statutory language" like that before us.[103] And even taken on their own terms, these statements do no more than confirm that some members of Congress hoped and wished that the Attorney General would exercise his discretion to register at least some pre-Act offenders. None of these snippets mentions a "feasibility" standard, and none can obscure the absence of such a standard in the law itself.

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[100] *Ante*, at 144.

[101] See *ante*, at 143–144.

[102] *Epic Systems Corp.* v. *Lewis*, 584 U. S. 497, 523 (2018).

[103] *Milner* v. *Department of Navy*, 562 U. S. 562, 572 (2011).

That leaves the plurality and the government to try to fish its feasibility standard from our decision in *Reynolds*. But *Reynolds* would make a difference only if it bound us as a matter of *stare decisis* to adopt an interpretation inconsistent with the statute's terms. And, of course, it does no such thing. The government and the plurality submit that *Reynolds* was premised on an understanding that Congress intended the statute to apply to pre-Act offenders to the maximum extent feasible. To support their reading they point to *Reynolds*' surmise that Congress "may well have thought [that there could be] practical problems" with applying SORNA to pre-Act offenders and for that reason left their registration obligations to be sorted out by the Attorney General.[104] But speculation about some of Congress's motives in adopting § 20913(d) aside, *Reynolds* plainly understood the statute itself as investing the Attorney General with sole power to decide whether and when to apply SORNA's requirements to pre-Act offenders.[105]

*

Nothing found here can come as a surprise. In *Reynolds*, the government told this Court that SORNA supplies no standards regulating the Attorney General's treatment of pre-Act offenders. This Court agreed, and everyone proceeded with eyes open about the potential constitutional consequences; in fact, the dissent expressly warned that adopting such a broad construction of the statute would yield the separation-of-powers challenge we face today.[106] Now, when

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[104] *Reynolds*, 565 U. S., at 440–441.

[105] *Id.*, at 445 (holding that "the Act's registration requirements do not apply to pre-Act offenders until the Attorney General so specifies"); *id.*, at 439 (rejecting argument that any SORNA requirements apply to pre-Act offenders "before the Attorney General validly specifies" they do); *id.*, at 440–441 (observing that the Attorney General might conclude that "different federal registration treatment of different categories of pre-Act offenders" is "warranted").

[106] See *id.*, at 450 (Scalia, J., dissenting).

the statute faces the chopping block, the government asks us to ignore its earlier arguments and reimagine (really, rewrite) the statute in a new and narrower way to avoid its long-predicted fate. No wonder some of us are not inclined to play along.

The only real surprise is that the Court fails to make good on the consequences the government invited, resolving nothing and deferring everything. In a future case with a full panel, I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code. That "is delegation running riot."[107]

[107] *Schechter Poultry*, 295 U. S., at 553 (Cardozo, J., concurring).

Syllabus

KNICK *v.* TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 17–647. Argued October 3, 2018—Reargued January 16, 2019—Decided June 21, 2019

The Township of Scott, Pennsylvania, passed an ordinance requiring that "[a]ll cemeteries . . . be kept open and accessible to the general public during daylight hours." Petitioner Rose Mary Knick, whose 90-acre rural property has a small family graveyard, was notified that she was violating the ordinance. Knick sought declaratory and injunctive relief in state court on the ground that the ordinance effected a taking of her property, but she did not bring an inverse condemnation action under state law seeking compensation. The Township responded by withdrawing the violation notice and staying enforcement of the ordinance. Without an ongoing enforcement action, the court held, Knick could not demonstrate the irreparable harm necessary for equitable relief, so it declined to rule on her request. Knick then filed an action in Federal District Court under 42 U. S. C. § 1983, alleging that the ordinance violated the Takings Clause of the Fifth Amendment. The District Court dismissed her claim under *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, which held that property owners must seek just compensation under state law in state court before bringing a federal takings claim under § 1983. The Third Circuit affirmed.

Held:

1. A government violates the Takings Clause when it takes property without compensation, and a property owner may bring a Fifth Amendment claim under § 1983 at that time. Pp. 187–202.

(a) In *Williamson County*, the Court held that, as relevant here, a property developer's federal takings claim was "premature" because he had not sought compensation through the State's inverse condemnation procedure. 473 U. S., at 197. The unanticipated consequence of this ruling was that a takings plaintiff who complied with *Williamson County* and brought a compensation claim in state court would—on proceeding to federal court after the unsuccessful state claim—have the federal claim barred because the full faith and credit statute required the federal court to give preclusive effect to the state court's decision. *San Remo Hotel, L. P.* v. *City and County of San Francisco*, 545 U. S. 323, 347. Pp. 187–189.

(b) This Court has long recognized that property owners may bring Fifth Amendment claims for compensation as soon as their property has been taken, regardless of any other post-taking remedies that may be available to the property owner. See *Jacobs* v. *United States*, 290 U. S. 13. The Court departed from that understanding in *Williamson County* and held that a taking gives rise not to a constitutional right to just compensation, but instead gives a right to a state law procedure that will eventually result in just compensation. Just two years after *Williamson County*, however, the Court returned to its traditional understanding of the Fifth Amendment, holding that the compensation remedy is required by the Constitution in the event of a taking. *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304. A property owner acquires a right to compensation immediately upon an uncompensated taking because the taking itself violates the Fifth Amendment. See *San Diego Gas & Elec. Co.* v. *San Diego*, 450 U. S. 621, 654 (Brennan, J., dissenting). The property owner may, therefore, bring a claim under § 1983 for the deprivation of a constitutional right at that time. Pp. 189–194.

(c) *Williamson County*'s understanding of the Takings Clause was drawn from *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, where the plaintiff sought to enjoin a federal statute because it effected a taking, even though the statute set up a mandatory arbitration procedure for obtaining compensation. *Id.*, at 1018. That case does not support *Williamson County*, however, because Congress—unlike the States—is free to require plaintiffs to exhaust administrative remedies before bringing constitutional claims. *Williamson County* also analogized its new state-litigation requirement to federal takings practice under the Tucker Act, but a claim for just compensation brought under the Tucker Act is not a prerequisite to a Fifth Amendment takings claim—it *is* a Fifth Amendment takings claim. *Williamson County* also looked to *Parratt* v. *Taylor*, 451 U. S. 527. But *Parratt* was not a takings case at all, and the analogy from the due process context to the takings context is strained. The poor reasoning of *Williamson County* may be partially explained by the circumstances in which the state-litigation issue reached the Court, which may not have permitted the Court to adequately test the logic of the state-litigation requirement or consider its implications. Pp. 194–198.

(d) Respondents read too broadly statements in prior opinions that the Takings Clause "does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation" after a taking. *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641, 659. Those statements concerned requests for injunctive relief, and the availability of subsequent compen-

sation meant that such an equitable remedy was not available. Simply because the property owner was not entitled to injunctive relief at the time of the taking does not mean there was no violation of the Takings Clause at that time. The history of takings litigation provides valuable context. At the time of the founding, there usually was no compensation remedy available to property owners, who could obtain only retrospective damages, as well as an injunction ejecting the government from the property going forward. But in the 1870s, as state courts began to recognize implied rights of action for damages under the state equivalents of the Takings Clause, they declined to grant injunctions because property owners had an adequate remedy at law. Congress enabled property owners to obtain compensation for takings by the Federal Government when it passed the Tucker Act in 1887, and this Court subsequently joined the state courts in holding that the compensation remedy is required by the Takings Clause itself. Today, because the federal and nearly all state governments provide just compensation remedies to property owners who have suffered a taking, equitable relief is generally unavailable. As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin government action effecting a taking. Pp. 198–202.

2. The state-litigation requirement of *Williamson County* is overruled. Several factors counsel in favor of this decision. *Williamson County* was poorly reasoned and conflicts with much of the Court's takings jurisprudence. Because of its shaky foundations, the rationale for the state-litigation requirement has been repeatedly recast by this Court and the defenders of *Williamson County*. The state-litigation requirement also proved to be unworkable in practice because the *San Remo* preclusion trap prevented takings plaintiffs from ever bringing their claims in federal court, contrary to the expectations of the *Williamson County* Court. Finally, there are no reliance interests on the state-litigation requirement. As long as post-taking compensation remedies are available, governments need not fear that federal courts will invalidate their regulations as unconstitutional. Pp. 202–206.

862 F. 3d 310, vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a concurring opinion, *post,* p. 206. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, *post,* p. 207.

J. David Breemer argued and reargued the cause for petitioner. With him on the briefs were *Meriem L. Hubbard*, *Brian T. Hodges*, and *Christina M. Martin*.

Counsel

Solicitor General Francisco argued and reargued the cause for the United States as *amicus curiae* urging vacatur and remand. With him on the briefs were *Principal Deputy Solicitor General Wall*, *Acting Assistant Attorneys General Wood* and *Readler*, *Deputy Assistant Attorneys General Grant* and *Mooppan*, and *Brian H. Fletcher*, *William B. Lazarus*, and *Brian C. Toth*.

Teresa Ficken Sachs argued and reargued the cause for respondents. With her on the briefs were *Mark J. Kozlowski*, *Matthew Littleton*, and *David T. Goldberg*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Ken Paxton*, Attorney General of Texas, *Jeffrey C. Mateer*, First Assistant Attorney General, *Scott A. Keller*, Solicitor General, *Bill Davis*, Assistant Solicitor General, and *Mike Hunter*, Attorney General of Oklahoma; for AARP et al. by *Julie Nepveu* and *William Alvarado Rivera*; for the American Farm Bureau Federation et al. by *Timothy S. Bishop*, *Chad M. Clamage*, *Bill Thomas*, *Ellen Steen*, and *Scott Yager*; for the Cato Institute et al. by *Ilya Shapiro*, *Ilya Somin*, *Kimberly S. Hermann*, *Manuel S. Klausner*, *Karen R. Harned*, *Luke A. Wake*, and *Braden Boucek*; for the Justice and Freedom Fund by *James L. Hirsen* and *Deborah J. Dewart*; for the National Association of Home Builders by *Devala A. Janardan* and *Thomas J. Ward*; for the Ohio Farm Bureau Federation by *Bruce L. Ingram*, *Joseph R. Miller*, *Thomas H. Fusonie*, and *Daniel E. Shuey*; for San Remo Hotel, L. P., et al. by *Paul F. Utrecht*; for the Washington Legal Foundation et al. by *Richard A. Samp*; and for the Western Manufactured Housing Communities Association by *R. S. Radford*.

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Xavier Becerra*, Attorney General of California, *Nicole U. Rinke* and *Jessica Tucker-Mohl*, Deputy Attorneys General, *Daniel A. Olivas*, Senior Assistant Attorney General, *Edward C. DuMont*, Solicitor General, and *Joshua A. Klein* and *Christina Bull Arndt*, Deputy Solicitors General, and joined by the Attorneys General for their respective jurisdictions as follows: *Matthew P. Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Curtis T. Hill*, *Jr.*, of Indiana, *Tom Miller* of Iowa, *Jeff Landry* of Louisiana, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Lori Swanson* of Minnesota, *Gurbir S. Grewal* of New Jersey, *Hector Balderas* of New Mexico, *Barbara D. Underwood* of New York, *Ellen F. Rosenblum* of Oregon, *Peter F. Kilmartin* of Rhode Island, *Sean D. Reyes* of Utah, *Thomas J. Dono-*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Takings Clause of the Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation." In *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172 (1985), we held that a property owner whose property has been taken by a local government has not suffered a violation of his Fifth Amendment rights—and thus cannot bring a federal takings claim in federal court—until a state court has denied his claim for just compensation under state law.

The *Williamson County* Court anticipated that if the property owner failed to secure just compensation under state law in state court, he would be able to bring a "ripe" federal takings claim in federal court. See *id.*, at 194. But as we later held in *San Remo Hotel, L. P.* v. *City and County of San Francisco*, 545 U. S. 323 (2005), a state court's resolution of a claim for just compensation under state law generally has preclusive effect in any subsequent federal suit. The takings plaintiff thus finds himself in a Catch-22: He cannot go to federal court without going to state court first;

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van, Jr., of Vermont, and *Robert W. Ferguson* of Washington; for the National Governors Association et al. by *Matthew D. Zinn*, *Andrew W. Schwartz*, *Laura D. Beaton*, and *Lisa E. Soronen*; and for Takings and Federal Courts Scholars by *Kathryn E. Kovacs*, *pro se*.

Briefs of *amici curiae* were filed for the American Planning Association by *John M. Baker* and *Katherine M. Swenson*; for the Becket Fund for Religious Liberty by *Lori H. Windham*, *Eric C. Rassbach*, *Eric Baxter*, and *Daniel Ortner*; for Cemetery Law Scholars by *Ryan M. Seidemann* and *Tanya D. Marsh*, both *pro se*; for the Center for Constitutional Jurisprudence by *John C. Eastman* and *Anthony T. Caso*; for the Citizens' Alliance for Property Rights Legal Fund et al. by *Robert H. Thomas*; for Congressman Steve King et al. by *Timothy S. Hollister*; for the Institute for Justice et al. by *Michael M. Berger*; and for the New England Legal Foundation by *John Pagliaro* and *Martin J. Newhouse*.

but if he goes to state court and loses, his claim will be barred in federal court. The federal claim dies aborning.

The *San Remo* preclusion trap should tip us off that the state-litigation requirement rests on a mistaken view of the Fifth Amendment. The Civil Rights Act of 1871, after all, guarantees "a federal forum for claims of unconstitutional treatment at the hands of state officials," and the settled rule is that "exhaustion of state remedies 'is *not* a prerequisite to an action under [42 U. S. C.] § 1983.'" *Heck* v. *Humphrey*, 512 U. S. 477, 480 (1994) (quoting *Patsy* v. *Board of Regents of Fla.*, 457 U. S. 496, 501 (1982)). But the guarantee of a federal forum rings hollow for takings plaintiffs, who are forced to litigate their claims in state court.

We now conclude that the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled. A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it. That does not mean that the government must provide compensation in advance of a taking or risk having its action invalidated: So long as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities. But it does mean that the property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under § 1983 at that time.

I

Petitioner Rose Mary Knick owns 90 acres of land in Scott Township, Pennsylvania, a small community just north of Scranton. Knick lives in a single-family home on the property and uses the rest of the land as a grazing area for horses and other farm animals. The property includes a small graveyard where the ancestors of Knick's neighbors are al-

legedly buried. Such family cemeteries are fairly common in Pennsylvania, where "backyard burials" have long been permitted.

In December 2012, the Township passed an ordinance requiring that "[a]ll cemeteries . . . be kept open and accessible to the general public during daylight hours." The ordinance defined a "cemetery" as "[a] place or area of ground, whether contained on private or public property, which has been set apart for or otherwise utilized as a burial place for deceased human beings." The ordinance also authorized Township "code enforcement" officers to "enter upon any property" to determine the existence and location of a cemetery. App. 21–23.

In 2013, a Township officer found several grave markers on Knick's property and notified her that she was violating the ordinance by failing to open the cemetery to the public during the day. Knick responded by seeking declaratory and injunctive relief in state court on the ground that the ordinance effected a taking of her property. Knick did not seek compensation for the taking by bringing an "inverse condemnation" action under state law. Inverse condemnation is "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant." *United States* v. *Clarke*, 445 U. S. 253, 257 (1980) (quoting D. Hagman, Urban Planning and Land Development Control Law 328 (1971); emphasis deleted). Inverse condemnation stands in contrast to direct condemnation, in which the government initiates proceedings to acquire title under its eminent domain authority. Pennsylvania, like every other State besides Ohio, provides a state inverse condemnation action. 26 Pa. Cons. Stat. § 502(c) (2009).[1]

[1] A property owner in Ohio who has suffered a taking without compensation must seek a writ of mandamus to compel the government to initiate condemnation proceedings. See, *e. g.*, *State ex rel. Doner* v. *Zody*, 130 Ohio St. 3d 446, 2011-Ohio-6117, 958 N. E. 2d 1235.

In response to Knick's suit, the Township withdrew the violation notice and agreed to stay enforcement of the ordinance during the state court proceedings. The court, however, declined to rule on Knick's request for declaratory and injunctive relief because, without an ongoing enforcement action, she could not demonstrate the irreparable harm necessary for equitable relief.

Knick then filed an action in Federal District Court under 42 U. S. C. § 1983, alleging that the ordinance violated the Takings Clause of the Fifth Amendment.[2] The District Court dismissed Knick's takings claim under *Williamson County* because she had not pursued an inverse condemnation action in state court. 2016 WL 4701549, *5–*6 (MD Pa., Sept. 8, 2016). On appeal, the Third Circuit noted that the ordinance was "extraordinary and constitutionally suspect," but affirmed the District Court in light of *Williamson County*. 862 F. 3d 310, 314 (2017).

We granted certiorari to reconsider the holding of *Williamson County* that property owners must seek just compensation under state law in state court before bringing a federal takings claim under § 1983. 583 U. S. 1166 (2018).

II

In *Williamson County*, a property developer brought a takings claim under § 1983 against a zoning board that had rejected the developer's proposal for a new subdivision. *Williamson County* held that the developer's Fifth Amendment claim was not "ripe" for two reasons. First, the developer still had an opportunity to seek a variance from the

[2] Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ."

appeals board, so any taking was therefore not yet final. 473 U. S., at 186–194. Knick does not question the validity of this finality requirement, which is not at issue here.

The second holding of *Williamson County* is that the developer had no federal takings claim because he had not sought compensation "through the procedures the State ha[d] provided for doing so." *Id.*, at 194. That is the holding Knick asks us to overrule. According to the Court, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the [Takings] Clause until it has used the procedure and been denied just compensation." *Id.*, at 195. The Court concluded that the developer's federal takings claim was "premature" because he had not sought compensation through the State's inverse condemnation procedure. *Id.*, at 197.

The unanticipated consequences of this ruling were not clear until 20 years later, when this Court decided *San Remo*. In that case, the takings plaintiffs complied with *Williamson County* and brought a claim for compensation in state court. 545 U. S., at 331. The complaint made clear that the plaintiffs sought relief only under the takings clause of the State Constitution, intending to reserve their Fifth Amendment claim for a later federal suit if the state suit proved unsuccessful. *Id.*, at 331–332. When that happened, however, and the plaintiffs proceeded to federal court, they found that their federal claim was barred. This Court held that the full faith and credit statute, 28 U. S. C. § 1738, required the federal court to give preclusive effect to the state court's decision, blocking any subsequent consideration of whether the plaintiff had suffered a taking within the meaning of the Fifth Amendment. 545 U. S., at 347. The adverse state court decision that, according to *Williamson County*, gave rise to a ripe federal takings claim simultaneously barred that claim, preventing the federal court from ever considering it.

The state-litigation requirement relegates the Takings Clause "to the status of a poor relation" among the provisions of the Bill of Rights. *Dolan* v. *City of Tigard*, 512 U. S. 374, 392 (1994). Plaintiffs asserting any other constitutional claim are guaranteed a federal forum under § 1983, but the state-litigation requirement "hand[s] authority over federal takings claims to state courts." *San Remo*, 545 U. S., at 350 (Rehnquist, C. J., concurring in judgment). Fidelity to the Takings Clause and our cases construing it requires overruling *Williamson County* and restoring takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights.

III

A

Contrary to *Williamson County*, a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it. The Clause provides: "[N]or shall private property be taken for public use, without just compensation." It does not say: "Nor shall private property be taken for public use, without an available procedure that will result in compensation." If a local government takes private property without paying for it, that government has violated the Fifth Amendment—just as the Takings Clause says—without regard to subsequent state court proceedings. And the property owner may sue the government at that time in federal court for the "deprivation" of a right "secured by the Constitution." 42 U. S. C. § 1983.

We have long recognized that property owners may bring Fifth Amendment claims against the Federal Government as soon as their property has been taken. The Tucker Act, which provides the standard procedure for bringing such claims, gives the Court of Federal Claims jurisdiction to

"render judgment upon any claim against the United States founded either upon the Constitution" or any federal law or contract for damages "in cases not sounding in tort." 28 U. S. C. § 1491(a)(1). We have held that "[i]f there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine." *United States* v. *Causby*, 328 U. S. 256, 267 (1946). And we have explained that "the act of taking" is the "event which gives rise to the claim for compensation." *United States* v. *Dow*, 357 U. S. 17, 22 (1958).

The Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner. That principle was confirmed in *Jacobs* v. *United States*, 290 U. S. 13 (1933), where we held that a property owner found to have a valid takings claim is entitled to compensation as if it had been "paid contemporaneously with the taking"—that is, the compensation must generally consist of the total value of the property when taken, plus interest from that time. *Id.*, at 17 (quoting *Seaboard Air Line R. Co.* v. *United States*, 261 U. S. 299, 306 (1923)). We rejected the view of the lower court that a property owner is entitled to interest only when the government provides a particular remedy—direct condemnation proceedings—and not when the owner brings a takings suit under the Tucker Act. "The form of the remedy d[oes] not qualify the right. It rest[s] upon the Fifth Amendment." 290 U. S., at 16.

Jacobs made clear that, no matter what sort of procedures the government puts in place to remedy a taking, a property owner has a Fifth Amendment entitlement to compensation as soon as the government takes his property without paying for it. Whether the government does nothing, forcing the owner to bring a takings suit under the Tucker Act, or whether it provides the owner with a statutory compensation remedy by initiating direct condemnation proceedings,

the owner's claim for compensation "rest[s] upon the Fifth Amendment."

Although *Jacobs* concerned a taking by the Federal Government, the same reasoning applies to takings by the States. The availability of any particular compensation remedy, such as an inverse condemnation claim under state law, cannot infringe or restrict the property owner's federal constitutional claim—just as the existence of a state action for battery does not bar a Fourth Amendment claim of excessive force. The fact that the State has provided a property owner with a procedure that may subsequently result in just compensation cannot deprive the owner of his Fifth Amendment right to compensation under the Constitution, leaving only the state law right. And that is key because it is the existence of the Fifth Amendment right that allows the owner to proceed directly to federal court under § 1983.

Williamson County had a different view of how the Takings Clause works. According to *Williamson County*, a taking does not give rise to a federal constitutional right to just compensation at that time, but instead gives a right to a state law procedure that will eventually result in just compensation. As the Court put it, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the [Takings] Clause until it has used the procedure and been denied just compensation." 473 U. S., at 195. In the absence of a state remedy, the Fifth Amendment right to compensation would attach immediately. But, under *Williamson County*, the presence of a state remedy qualifies the right, preventing it from vesting until exhaustion of the state procedure. That is what *Jacobs* confirmed could not be done.

Just two years after *Williamson County*, in *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304 (1987), the Court returned to the understanding that the Fifth Amendment right to compensa-

tion automatically arises at the time the government takes property without paying for it. Relying heavily on *Jacobs* and other Fifth Amendment precedents neglected by *Williamson County*, *First English* held that a property owner is entitled to compensation for the temporary loss of his property. We explained that "government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.'" 482 U. S., at 315. Because of "the self-executing character" of the Takings Clause "with respect to compensation," a property owner has a constitutional claim for just compensation at the time of the taking. *Ibid.* (quoting *Clarke*, 445 U. S., at 257). The government's post-taking actions (there, repeal of the challenged ordinance) cannot nullify the property owner's existing Fifth Amendment right: "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation." 482 U. S., at 321.[3]

In holding that a property owner acquires an irrevocable right to just compensation immediately upon a taking, *First English* adopted a position Justice Brennan had taken in an earlier dissent. See *id.*, at 315, 318 (quoting and citing *San Diego Gas & Elec. Co.* v. *San Diego*, 450 U. S. 621, 654–655, 657

[3] *First English* distinguished *Williamson County* in a footnote, explaining that the case addressed only "whether the constitutional claim was ripe for review" before the State denied compensation. 482 U. S., at 320, n. 10. But *Williamson County* was based on the premise that there was no Fifth Amendment claim *at all* until the State denies compensation. Having rejected that premise, *First English* eliminated the rationale for the state-litigation requirement. The author of *First English* later recognized that it was "not clear . . . that *Williamson County* was correct in demanding that . . . the claimant must seek compensation in state court before bringing a federal takings claim in federal court." *San Remo Hotel, L. P.* v. *City and County of San Francisco*, 545 U. S. 323, 349 (2005) (Rehnquist, C. J., concurring in judgment).

(1981) (Brennan, J., dissenting)).[4] In that opinion, Justice Brennan explained that "once there is a 'taking,' compensation *must* be awarded" because "[a]s soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation." *Id.*, at 654.

First English embraced that view, reaffirming that "in the event of a taking, the compensation remedy is required by the Constitution." 482 U. S., at 316; see *ibid.*, n. 9 (rejecting the view that "the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government" (quoting Brief for United States as *Amicus Curiae* 14)). Compensation under the Takings Clause is a remedy for the "constitutional violation" that "the landowner has *already* suffered" at the time of the uncompensated taking. *San Diego Gas & Elec. Co.*, 450 U. S., at 654 (Brennan, J., dissenting); see *First English*, 482 U. S., at 315.

A later payment of compensation may remedy the constitutional violation that occurred at the time of the taking, but that does not mean the violation never took place. The violation is the only reason compensation was owed in the first place. A bank robber might give the loot back, but he still robbed the bank. The availability of a subsequent compensation remedy for a taking without compensation no more means there never was a constitutional violation in the first place than the availability of a damages action renders negligent conduct compliant with the duty of care.

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[4] Justice Brennan was joined by Justices Stewart, Marshall, and Powell. The majority did not disagree with Justice Brennan's analysis of the merits, but concluded that the Court lacked jurisdiction to address the question presented. Justice Rehnquist, concurring on the jurisdictional issue, noted that if he were satisfied that jurisdiction was proper, he "would have little difficulty in agreeing with much of what is said in the dissenting opinion." 450 U. S., at 633–634. The Court reached the merits of the question presented in *San Diego* in *First English*, adopting Justice Brennan's view in an opinion by Chief Justice Rehnquist.

In sum, because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time. Just as someone whose property has been taken by the Federal Government has a claim "founded . . . upon the Constitution" that he may bring under the Tucker Act, someone whose property has been taken by a local government has a claim under § 1983 for a "deprivation of [a] right[ ] . . . secured by the Constitution" that he may bring upon the taking in federal court. The "general rule" is that plaintiffs may bring constitutional claims under § 1983 "without first bringing any sort of state lawsuit, even when state court actions addressing the underlying behavior are available." D. Dana & T. Merrill, Property: Takings 262 (2002); see *McNeese* v. *Board of Ed. for Community Unit School Dist. 187*, 373 U. S. 668, 672 (1963) (observing that it would defeat the purpose of § 1983 "if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court"); *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."). This is as true for takings claims as for any other claim grounded in the Bill of Rights.

B

Williamson County effectively established an exhaustion requirement for § 1983 takings claims when it held that a property owner must pursue state procedures for obtaining compensation before bringing a federal suit. But the Court did not phrase its holding in those terms; if it had, its error would have been clear. Instead, *Williamson County* broke with the Court's longstanding position that a property owner has a constitutional claim to compensation at the time the government deprives him of his property, and held that there can be no uncompensated taking, and thus no Fifth Amendment claim actionable under § 1983, until the property

owner has tried and failed to obtain compensation through the available state procedure. "[U]ntil it has used the procedure and been denied just compensation," the property owner "'has no claim against the Government' for a taking." 473 U. S., at 194–195 (quoting *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1018, n. 21 (1984)).

Williamson County drew that understanding of the Clause from *Ruckelshaus* v. *Monsanto Co.*, a decision from the prior Term. *Monsanto* did not involve a takings claim for just compensation. The plaintiff there sought to enjoin a federal statute because it effected a taking, even though the statute set up a special arbitration procedure for obtaining compensation, and the plaintiff could bring a takings claim pursuant to the Tucker Act if arbitration did not yield sufficient compensation. 467 U. S., at 1018. The Court rejected the plaintiff's claim because "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." *Id.*, at 1016 (footnote omitted). That much is consistent with our precedent: Equitable relief was not available because monetary relief was under the Tucker Act.

That was enough to decide the case. But *Monsanto* went on to say that if the plaintiff obtained compensation in arbitration, then "no taking has occurred and the [plaintiff] has no claim against the Government." *Id.*, at 1018, n. 21. Certainly it is correct that a fully compensated plaintiff has no further claim, but that is because the taking has been *remedied* by compensation, not because there was *no taking* in the first place. See *First English*, 482 U. S., at 316, n. 9. The statute in *Monsanto* simply required the plaintiff to attempt to vindicate its claim to compensation through arbitration before proceeding under the Tucker Act. The case offers no support to *Williamson County* in this regard, because Congress—unlike the States—is free to require plaintiffs to exhaust administrative remedies before bringing

constitutional claims. See *McCarthy* v. *Madigan*, 503 U. S. 140, 144 (1992) ("Where Congress specifically mandates, exhaustion is required.").

Williamson County also relied on *Monsanto* when it analogized its new state-litigation requirement to federal takings practice, stating that "taking[s] claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." 473 U. S., at 195. But the Court was simply confused. A claim for just compensation brought under the Tucker Act is not a prerequisite to a Fifth Amendment takings claim—it *is* a Fifth Amendment takings claim. A party who loses a Tucker Act suit has nowhere else to go to seek compensation for an alleged taking.

Other than *Monsanto*, the principal case to which *Williamson County* looked was *Parratt* v. *Taylor*, 451 U. S. 527 (1981). Like *Monsanto*, *Parratt* did not involve a takings claim for just compensation. Indeed, it was not a takings case at all. *Parratt* held that a prisoner deprived of $23.50 worth of hobby materials by the rogue act of a state employee could not state a due process claim if the State provided adequate post-deprivation process. 451 U. S., at 543–544. But the analogy from the due process context to the takings context is strained, as *Williamson County* itself recognized. See 473 U. S., at 195, n. 14. It is not even possible for a State to provide pre-deprivation due process for the unauthorized act of a single employee. That is quite different from the taking of property *by the government* through physical invasion or a regulation that destroys a property's productive use.

The poor reasoning of *Williamson County* may be partially explained by the circumstances in which the state-litigation issue reached the Court. The Court granted certiorari to decide whether the Fifth Amendment entitles a property owner to just compensation when a regulation temporarily deprives him of the use of his property. (*First*

English later held that the answer was yes.) As *amicus curiae* in support of the local government, the United States argued in this Court that the developer could not state a Fifth Amendment claim because it had not pursued an inverse condemnation suit in state court. Neither party had raised that argument before.[5] The Court then adopted the reasoning of the Solicitor General in an alternative holding, even though the case could have been resolved solely on the narrower and settled ground that no taking had occurred because the zoning board had not yet come to a final decision regarding the developer's proposal. In these circumstances, the Court may not have adequately tested the logic of the state-litigation requirement or considered its implications, most notably the preclusion trap later sprung by *San Remo*. That consequence was totally unanticipated in *Williamson County*.

The dissent, doing what respondents do not even dare to attempt, defends the original rationale of *Williamson County*—that there is no Fifth Amendment violation, and thus no Fifth Amendment claim, until the government denies the property owner compensation in a subsequent proceeding.[6] But although the dissent makes a more thoughtful and

[5] The Solicitor General continues this tradition here, arguing for the first time as *amicus curiae* that state inverse condemnation claims "aris[e] under" federal law and can be brought in federal court under 28 U. S. C. § 1331 through the *Grable* doctrine. Brief for United States as *Amicus Curiae* 22–24; see *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Mfg.*, 545 U. S. 308 (2005). Because we agree with the Solicitor General's principal contention that federal takings claims can be brought immediately under § 1983, we have no occasion to consider his novel § 1331 argument.

[6] The dissent thinks that respondents still press this theory. *Post*, at 212, n. 3 (opinion of KAGAN, J.). But respondents instead describe *Williamson County* as resting on an understanding not of the elements of a federal takings claim but of the scope of 42 U. S. C. § 1983. They even go so far as to rewrite petitioner's question presented in such terms. Brief for Respondents i. For respondents, it does not matter whether a property owner has a Fifth Amendment claim at the time of a taking. What matters is hat, in re-

considered argument than *Williamson County*, it cannot reconcile its view with our repeated holdings that a property owner acquires a constitutional right to compensation at the time of the taking. See *supra*, at 190–193. The only reason that a taking would automatically entitle a property owner to the remedy of compensation is that, as Justice Brennan explained, with the uncompensated taking "the landowner has *already* suffered a constitutional violation." *San Diego Gas & Elec. Co.*, 450 U. S., at 654 (dissenting opinion). The dissent here provides no more reason to resist that conclusion than did *Williamson County*.

C

The Court in *Williamson County* relied on statements in our prior opinions that the Clause "does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation" after a taking. *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641, 659 (1890). Respondents rely on the same cases in contending that uncompensated takings for which compensation is subsequently available do not violate the Fifth Amendment at the time of the taking. But respondents read those statements too broadly. They concerned requests for injunctive relief, and the availability of subsequent compensation meant that such an equitable remedy was not available. See *Regional Rail*

spondents' view, no constitutional violation occurs for purposes of § 1983 until the government has subsequently denied compensation. That characterization has no basis in the *Williamson County* opinion, which did not even quote § 1983 and stated that the Court's reasoning applied with equal force to takings by the Federal Government, not covered by § 1983. 473 U. S., at 195. Respondents' attempt to recast the state-litigation requirement as a § 1983-specific rule fails for the same reason as the logic of *Williamson County*—a property owner has a Fifth Amendment claim for a violation of the Takings Clause as soon as the government takes his property without paying for it.

Reorganization Act Cases, 419 U. S. 102, 107, 149 (1974) (reversing a decision "enjoin[ing]" the enforcement of a federal statute because "the availability of the Tucker Act guarantees an adequate remedy at law for any taking which might occur"); *Hurley* v. *Kincaid*, 285 U. S. 95, 99, 105 (1932) (rejecting a request to "enjoin the carrying out of any work" on a flood control project because the Tucker Act provided the plaintiff with "a plain, adequate, and complete remedy at law"). Simply because the property owner was not entitled to injunctive relief at the time of the taking does not mean there was no violation of the Takings Clause at that time.

The history of takings litigation provides valuable context. At the time of the founding there usually was no compensation remedy available to property owners. On occasion, when a legislature authorized a particular government action that took private property, it might also create a special owner-initiated procedure for obtaining compensation. But there were no general causes of action through which plaintiffs could obtain compensation for property taken for public use. Brauneis, The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law, 52 Vand. L. Rev. 57, 69–70, and n. 33 (1999).

Until the 1870s, the typical recourse of a property owner who had suffered an uncompensated taking was to bring a common law trespass action against the responsible corporation or government official. The official would then raise the defense that his trespass was lawful because authorized by statute or ordinance, and the plaintiff would respond that the law was unconstitutional because it provided for a taking without just compensation. If the plaintiff prevailed, he nonetheless had no way at common law to obtain money damages for a permanent taking—that is, just compensation for the total value of his property. He could obtain only retrospective damages, as well as an injunction ejecting the government from his property going forward. See *id.*, at 67–69, 97–99.

As Chancellor Kent explained when granting a property owner equitable relief, the Takings Clause and its analogs in state constitutions required that "a fair compensation must, in all cases, be *previously* made to the individuals affected." *Gardner* v. *Newburgh*, 2 Johns. Ch. 162, 166 (N. Y. 1816) (emphasis added). If a government took property without payment, a court would set aside the taking because it violated the Constitution and order the property restored to its owner. The Framers meant to prohibit the Federal Government from *taking* property without paying for it. Allowing the government to *keep* the property pending subsequent compensation to the owner, in proceedings that hardly existed in 1787, was not what they envisioned.

Antebellum courts, which had no means of compensating a property owner for his loss, had no way to redress the violation of an owner's Fifth Amendment rights other than ordering the government to give him back his property. See *Callender* v. *Marsh*, 18 Mass. 418, 430–431 (1823) ("[I]f by virtue of any legislative act the land of any citizen should be occupied by the public . . . , without any means provided to indemnify the owner of the property, . . . because such a statute would be directly contrary to the [Massachusetts takings clause]; and as no action can be maintained against the public for damages, the only way to secure the party in his constitutional rights would be to declare void the public appropriation."). But in the 1870s, as state courts began to recognize implied rights of action for damages under the state equivalents of the Takings Clause, they declined to grant injunctions because property owners had an adequate remedy at law. See, *e. g.*, *Stetson* v. *Chicago & Evanston R. Co.*, 75 Ill. 74, 78 (1874) ("What injury, if any, [the property owner] has sustained, may be compensated by damages recoverable by an action at law."); see also Brauneis, *supra*, at 97–99, 110–112. On the federal level, Congress enabled property owners to obtain compensation for takings in federal court when it passed the Tucker Act in 1887, and we

subsequently joined the state courts in holding that the compensation remedy is required by the Takings Clause itself. See *First English*, 482 U. S., at 316 (collecting cases).

Today, because the federal and nearly all state governments provide just compensation remedies to property owners who have suffered a taking, equitable relief is generally unavailable. As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking. But that is because, as the Court explained in *First English*, such a procedure is a remedy for a taking that violated the Constitution, not because the availability of the procedure somehow prevented the violation from occurring in the first place. See *supra*, at 191–193.[7]

The dissent contends that our characterization of *Cherokee Nation* effectively overrules "a hundred-plus years of legal rulings." *Post*, at 213 (opinion of KAGAN, J.). But under today's decision every one of the cases cited by the dissent would come out the same way—the plaintiffs would not be entitled to the relief they requested because they could instead pursue a suit for compensation. The premise of such a suit for compensation is that the property owner has already

[7] Among the cases invoking the *Cherokee Nation* language that the parties have raised, only one, *Yearsley* v. *W. A. Ross Constr. Co.*, 309 U. S. 18 (1940), rejected a demand for compensation. *Yearsley* concerned a state tort suit alleging a taking by a contractor building dikes for the Federal Government. In ruling for the contractors, we suggested that the taking did not violate the Fifth Amendment because the property owner had the opportunity to pursue a claim for just compensation under the Tucker Act. As explained, however, a claim for compensation brought under the Tucker Act *is* a claim for a violation of the Fifth Amendment; it does not prevent a violation from occurring. Regardless, *Yearsley* was right to hold that the contractors were immune from suit. Because the Tucker Act provides a complete remedy for any taking by the Federal Government, it "excludes liability of the Government's representatives lawfully acting on its behalf in relation to the taking," barring the plaintiffs from seeking any relief from the contractors themselves. *Id.*, at 22.

suffered a violation of the Fifth Amendment that may be remedied by money damages.[8]

* * *

We conclude that a government violates the Takings Clause when it takes property without compensation, and that a property owner may bring a Fifth Amendment claim under § 1983 at that time. That does not as a practical matter mean that government action or regulation may not proceed in the absence of contemporaneous compensation. Given the availability of post-taking compensation, barring the government from acting will ordinarily not be appropriate. But because the violation is complete at the time of the taking, pursuit of a remedy in federal court need not await any subsequent state action. Takings claims against local governments should be handled the same as other claims under the Bill of Rights. *Williamson County* erred in holding otherwise.

IV

The next question is whether we should overrule *Williamson County*, or whether *stare decisis* counsels in favor of adhering to the decision, despite its error. The doctrine of *stare decisis* reflects a judgment "that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.'" *Agostini* v. *Felton*, 521 U. S. 203, 235 (1997) (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting)). The doctrine "is at its weakest when we interpret the Constitution," as we did in *Williamson County*, because only this Court

[8] The dissent also asserts that today's ruling "betrays judicial federalism." *Post*, at 221. But since the Civil Rights Act of 1871, part of "judicial federalism" has been the availability of a federal cause of action when a local government violates the Constitution. 42 U. S. C. § 1983. Invoking that federal protection in the face of state action violating the Fifth Amendment cannot properly be regarded as a betrayal of federalism.

or a constitutional amendment can alter our holdings. *Agostini*, 521 U. S., at 235.

We have identified several factors to consider in deciding whether to overrule a past decision, including "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision." *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878, 917 (2018). All of these factors counsel in favor of overruling *Williamson County*.

Williamson County was not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence. See *supra*, at 194–196. Its key conclusion, which it drew from unnecessary language in *Monsanto*—that a property owner does not have a ripe federal takings claim until he has unsuccessfully pursued an initial state law claim for just compensation—ignored *Jacobs* and many subsequent decisions holding that a property owner acquires a Fifth Amendment right to compensation at the time of a taking. This contradiction was on stark display just two years later in *First English*.

The decision has come in for repeated criticism over the years from Justices of this Court and many respected commentators. See *San Remo*, 545 U. S., at 348 (Rehnquist, C. J., joined by O'Connor, Kennedy, and THOMAS, JJ., concurring in judgment); *Arrigoni Enterprises, LLC* v. *Durham*, 578 U. S. 951 (2016) (THOMAS, J., joined by Kennedy, J., dissenting from denial of certiorari); Merrill, Anticipatory Remedies for Takings, 128 Harv. L. Rev. 1630, 1647–1649 (2015); McConnell, *Horne* and the Normalization of Takings Litigation: A Response to Professor Echeverria, 43 Env. L. Rep. 10749, 10751 (2013); Friedman, Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts, 104 Colum. L. Rev. 1211, 1264 (2004); Monaghan, State Law Wrongs, State Law Remedies, and the Fourteenth Amendment, 86 Colum. L. Rev. 979, 989 (1986). Even the academic defenders of the state-litigation requirement

base it on federalism concerns (although they do not reconcile those concerns with the settled construction of § 1983) rather than the reasoning of the opinion itself. See Echeverria, *Horne* v. *Department of Agriculture*: An Invitation To Reexamine "Ripeness" Doctrine in Takings Litigation, 43 Env. L. Rep. 10735, 10744 (2013); Sterk, The Demise of Federal Takings Litigation, 48 Wm. & Mary L. Rev. 251, 288 (2006).

Because of its shaky foundations, the state-litigation requirement has been a rule in search of a justification for over 30 years. We eventually abandoned the view that the requirement is an element of a takings claim and recast it as a "prudential" ripeness rule. See *Horne* v. *Department of Agriculture*, 569 U. S. 513, 525–526 (2013); *Suitum* v. *Tahoe Regional Planning Agency*, 520 U. S. 725, 733–734 (1997). No party defends that approach here. See Brief for Respondents 37; Brief for United States as *Amicus Curiae* 19–20. Respondents have taken a new tack, adopting a § 1983-specific theory at which *Williamson County* did not even hint. See n. 6, *supra*. The fact that the justification for the state-litigation requirement continues to evolve is another factor undermining the force of *stare decisis*. See *Janus*, 585 U. S., at 906.

The state-litigation requirement has also proved to be unworkable in practice. *Williamson County* envisioned that takings plaintiffs would ripen their federal claims in state court and then, if necessary, bring a federal suit under § 1983. But, as we held in *San Remo*, the state court's resolution of the plaintiff's inverse condemnation claim has preclusive effect in any subsequent federal suit. The upshot is that many takings plaintiffs never have the opportunity to litigate in a federal forum that § 1983 by its terms seems to provide. That significant consequence was not considered by the Court in *Williamson County*.

The dissent argues that our constitutional holding in *Williamson County* should enjoy the "enhanced" form of *stare decisis* we usually reserve for statutory decisions, because

Congress could have eliminated the *San Remo* preclusion trap by amending the full faith and credit statute. *Post*, at 222 (quoting *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 456 (2015)). But takings plaintiffs, unlike plaintiffs bringing any other constitutional claim, would still have been forced to pursue relief under state law before they could bring suit in federal court. Congress could not have lifted that unjustified exhaustion requirement because, under *Williamson County*, a property owner had no federal claim until a state court denied him compensation.

Finally, there are no reliance interests on the state-litigation requirement. We have recognized that the force of *stare decisis* is "reduced" when rules that do not "serve as a guide to lawful behavior" are at issue. *United States* v. *Gaudin*, 515 U. S. 506, 521 (1995); see *Alleyne* v. *United States*, 570 U. S. 99, 119 (2013) (SOTOMAYOR, J., concurring). Our holding that uncompensated takings violate the Fifth Amendment will not expose governments to new liability; it will simply allow into federal court takings claims that otherwise would have been brought as inverse condemnation suits in state court.

Governments need not fear that our holding will lead federal courts to invalidate their regulations as unconstitutional. As long as just compensation remedies are available—as they have been for nearly 150 years—injunctive relief will be foreclosed. For the same reason, the Federal Government need not worry that courts will set aside agency actions as unconstitutional under the Administrative Procedure Act. 5 U. S. C. § 706(2)(B). Federal courts will not invalidate an otherwise lawful uncompensated taking when the property owner can receive complete relief through a Fifth Amendment claim brought under the Tucker Act.

In light of all the foregoing, the dissent cannot, with respect, fairly maintain its extreme assertions regarding our application of the principle of *stare decisis*.

* * *

The state-litigation requirement of *Williamson County* is overruled. A property owner may bring a takings claim under § 1983 upon the taking of his property without just compensation by a local government. The judgment of the United States Court of Appeals for the Third Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

The Fifth Amendment's Takings Clause prohibits the government from "tak[ing]" private property "without just compensation." The Court correctly interprets this text by holding that a violation of this Clause occurs as soon as the government takes property without paying for it.

The United States, by contrast, urges us not to enforce the Takings Clause as written. It worries that requiring payment to accompany a taking would allow courts to enjoin or invalidate broad regulatory programs "merely" because the program takes property without paying for it. Brief for United States as *Amicus Curiae* 12. According to the United States, "there is a 'nearly infinite variety of ways in which government actions or regulations can affect property interests,'" and it ought to be good enough that the government "implicitly promises to pay compensation for any taking" if a property owner successfully sues the government in court. Supplemental Letter Brief for United States as *Amicus Curiae* 5 (Supp. Brief) (citing Tucker Act, 28 U. S. C. § 1491). Government officials, the United States contends, should be able to implement regulatory programs "without fear" of injunction or invalidation under the Takings Clause, "even when" the program is so far reaching that the officials "cannot determine whether a taking will occur." Supp. Brief 5.

This "sue me" approach to the Takings Clause is untenable. The Fifth Amendment does not merely provide a dam-

ages remedy to a property owner willing to "shoulder the burden of securing compensation" after the government takes property without paying for it. *Arrigoni Enterprises, LLC* v. *Durham*, 578 U. S. 951, 952 (2016) (THOMAS, J., dissenting from denial of certiorari). Instead, it makes just compensation a "prerequisite" to the government's authority to "tak[e] property for public use." *Ibid.* A "purported exercise of the eminent-domain power" is therefore "invalid" unless the government "pays just compensation before or at the time of its taking." *Ibid.* If this requirement makes some regulatory programs "unworkable in practice," Supp. Brief 5, so be it—our role is to enforce the Takings Clause as written.

Of course, as the Court correctly explains, the United States' concerns about injunctions may be misplaced. *Ante*, at 198–200. Injunctive relief is not available when an adequate remedy exists at law. *E. g.*, *Monsanto Co.* v. *Geertson Seed Farms*, 561 U. S. 139, 156 (2010). And even when relief is appropriate for a particular plaintiff, it does not follow that a court may enjoin or invalidate an entire regulatory "program," Supp. Brief 5, by granting relief "beyond the parties to the case," *Trump* v. *Hawaii*, 585 U. S. 667, 717 (2018) (THOMAS, J., concurring); see *id.*, at 713 (expressing skepticism about "universal injunctions").

Still, "[w]hen the government repudiates [its] duty" to pay just compensation, its actions "are not only unconstitutional" but may be "tortious as well." *Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U. S. 687, 717 (1999) (plurality opinion). I do not understand the Court's opinion to foreclose the application of ordinary remedial principles to takings claims and related common-law tort claims, such as trespass. I therefore join it in full.

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting.

Today, the Court formally overrules *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson*

City, 473 U. S. 172 (1985). But its decision rejects far more than that single case. *Williamson County* was rooted in an understanding of the Fifth Amendment's Takings Clause stretching back to the late 1800s. On that view, a government could take property so long as it provided a reliable mechanism to pay just compensation, even if the payment came after the fact. No longer. The majority today holds, in conflict with precedent after precedent, that a government violates the Constitution whenever it takes property without advance compensation—no matter how good its commitment to pay. That conclusion has no basis in the Takings Clause. Its consequence is to channel a mass of quintessentially local cases involving complex state-law issues into federal courts. And it transgresses all usual principles of *stare decisis*. I respectfully dissent.

I

Begin with the basics—the meaning of the Takings Clause. The right that Clause confers is not to be free from government takings of property for public purposes. Instead, the right is to be free from those takings when the government fails to provide "just compensation." In other words, the government *can* take private property for public purposes, so long as it fairly pays the property owner. That precept, which the majority does not contest, comes straight out of the constitutional text: "[P]rivate property [shall not] be taken for public use, without just compensation." Amdt. 5. "As its language indicates, [the Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 314 (1987). And that constitutional choice accords with ancient principles about what governments do. The eminent domain power—the capacity to "take private property for public uses"—is an integral "attribute of sovereignty." *Boom Co.* v. *Patterson*, 98 U. S. 403, 406 (1879); see *Kohl* v. *United States*, 91 U. S. 367, 371

(1876) (The power is "essential to [the Government's] independent existence and perpetuity"). Small surprise, then, that the Constitution does not prohibit takings for public purposes, but only requires the government to pay fair value.

In that way, the Takings Clause is unique among the Bill of Rights' guarantees. It is, for example, unlike the Fourth Amendment's protection against excessive force—which the majority mistakenly proposes as an analogy. See *ante*, at 191. Suppose a law enforcement officer uses excessive force and the victim recovers damages for his injuries. Did a constitutional violation occur? Of course. The Constitution prohibits what the officer did; the payment of damages merely remedied the constitutional wrong. But the Takings Clause is different because it does not prohibit takings; to the contrary, it permits them provided the government gives just compensation. So when the government "takes and pays," it is not violating the Constitution at all. Put another way, a Takings Clause violation has two necessary elements. First, the government must take the property. Second, it must deny the property owner just compensation. See *Horne* v. *Department of Agriculture*, 569 U. S. 513, 525–526 (2013) ("[A] Fifth Amendment claim is premature until it is clear that the Government has both taken property *and* denied just compensation" (emphasis in original)). If the government has not done both, no constitutional violation has happened. All this is well-trod ground. See, *e. g.*, *United States* v. *Jones*, 109 U. S. 513, 518 (1883); *Albert Hanson Lumber Co.* v. *United States*, 261 U. S. 581, 586 (1923). Even the majority (despite its faulty analogy) does not contest it.

Similarly well-settled—until the majority's opinion today—was the answer to a follow-on question: At what point has the government denied a property owner just compensation, so as to complete a Fifth Amendment violation? For over a hundred years, this Court held that advance or contemporaneous payment was not required, so long as the government had established reliable procedures for an owner

to later obtain just compensation (including interest for any time elapsed). The rule got its start in *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641 (1890), where the Tribe argued that a federal statute authorizing condemnation of its property violated the Fifth Amendment because the law did not require advance payment. The Court disagreed. It held that the Takings Clause "does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken" so long as the government made available to the owner "reasonable, certain and adequate provision for obtaining compensation" afterward. *Id.*, at 659. Decade after decade, the Court repeated that principle.[1] As another case put the point: The Takings Clause does not demand "that compensation should be made previous to the taking" so long as "adequate means [are] provided for a reasonably just and prompt ascertainment and payment of the compensation." *Crozier* v. *Krupp A. G.*, 224 U. S. 290, 306 (1912). And the Court also made clear that a statute creating a right of action against the responsible government entity generally qualified as a constitutionally adequate compensatory mechanism. See, *e. g.*, *Williams* v. *Parker*, 188 U. S. 491, 502 (1903); *Yearsley* v. *W. A. Ross Constr. Co.*, 309 U. S. 18, 20–21 (1940).[2]

[1] See also, *e. g.*, *Yearsley* v. *W. A. Ross Constr. Co.*, 309 U. S. 18, 21–22 (1940); *Hurley* v. *Kincaid*, 285 U. S. 95, 104 (1932); *Dohany* v. *Rogers*, 281 U. S. 362, 365 (1930); *Joslin Mfg. Co.* v. *Providence*, 262 U. S. 668, 677 (1923); *Albert Hanson Lumber Co.* v. *United States*, 261 U. S. 581, 587 (1923); *Hays* v. *Port of Seattle*, 251 U. S. 233, 238 (1920); *Bragg* v. *Weaver*, 251 U. S. 57, 62 (1919); *Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 196 U. S. 239, 251–252 (1905); *Williams* v. *Parker*, 188 U. S. 491, 502 (1903); *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 568 (1898); *Sweet* v. *Rechel*, 159 U. S. 380, 400–402 (1895).

[2] In many of these cases, the Court held as well that if payment occurs later, it must include interest. See, *e. g.*, *id.*, at 407; *Albert Hanson Lumber Co.*, 261 U. S., at 586. That requirement flows from the constitutional demand for "just" compensation: As one of the early cases explained, the property owner must be placed "in as good position pecuniarily as he would have been if his property had not been taken." *Ibid.*

Williamson County followed from those decisions as night the day. The case began when a local planning commission rejected a property owner's development proposal. The owner chose not to seek compensation through the procedure the State had created—an "inverse condemnation" action against the commission. Instead, the owner sued in federal court alleging a Takings Clause violation under 42 U. S. C. § 1983. Consistent with the century's worth of precedent I have recounted above, the Court found that no Fifth Amendment violation had yet occurred. See 473 U. S., at 195. The Court first recognized that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Id.*, at 194. Next, the Court stated (citing no fewer than five precedents) that the Amendment does not demand that "compensation be paid in advance of, or contemporaneously with, the taking." *Ibid.* "[A]ll that is required," the Court continued, is that the State have provided "a 'reasonable, certain and adequate provision for obtaining compensation.'" *Ibid.* (quoting *Cherokee Nation*, 135 U. S., at 659). Here, the State had done so: Nothing suggested that the inverse condemnation procedure was inadequate. 473 U. S., at 196–197. So the property owner's claim was "not yet ripe": The owner could not "claim a violation of the [Takings] Clause until it [had] used the procedure and been denied." *Id.*, at 194–195.

So contrary to the majority's portrayal, *Williamson County* did not result from some inexplicable confusion about "how the Takings Clause works." *Ante*, at 191. Far from it. *Williamson County* built on a long line of decisions addressing the elements of a Takings Clause violation. The Court there said only two things remotely new. First, the Court found that the State's inverse condemnation procedure qualified as a "reasonable, certain and adequate" procedure. But no one in this case disputes anything to do with that conclusion—including that the equivalent Pennsylvania procedure here is similarly adequate. Second, the Court held

that a § 1983 suit could not be brought until a property owner had unsuccessfully invoked the State's procedure for obtaining payment. But that was a direct function of the Court's prior holdings. Everyone agrees that a § 1983 suit cannot be brought before a constitutional violation has occurred. And according to the Court's repeated decisions, a Takings Clause violation does not occur until an owner has used the government's procedures and failed to obtain just compensation. All that *Williamson County* did was to put the period on an already-completed sentence about when a takings claim arises.[3]

Today's decision thus overthrows the Court's long-settled view of the Takings Clause. The majority declares, as against a mountain of precedent, that a government taking private property for public purposes must pay compensation at that moment or in advance. See *ante*, at 189–190. If the government fails to do so, a constitutional violation has occurred, regardless of whether "reasonable, certain and adequate" compensatory mechanisms exist. *Cherokee Nation*, 135 U. S., at 659. And regardless of how many times this Court

[3] Contrary to the majority's description, see *ante*, at 197, and n. 6, the respondents have exactly this view of *Williamson County* (and of the cases preceding it). The respondents discuss (as I do, see *supra*, at 209–210) the "long line of precedent" holding that "the availability of a reasonable, certain, and adequate inverse-condemnation procedure fulfills the duty" of a government to pay just compensation for a taking. Brief for Respondents 22–23. The respondents then conclude (again, as I do, see *supra*, at 211–212) that *Williamson County* "sound[ly]" and "straightforwardly applied that precedent to hold that a property owner who forgoes an available and adequate inverse-condemnation remedy has not been deprived of any constitutional right and thus cannot proceed under Section 1983." Brief for Respondents 22. (Again contra the majority, the respondents' only theory of § 1983 is the one everyone agrees with—that a § 1983 suit cannot be brought before a constitutional violation has occurred.) So while I appreciate the compliment, I cannot claim to argue anything novel or "dar[ing]" here. *Ante*, at 197. My argument is the same as the respondents', which is the same as *Williamson County*'s, which is the same as all the prior precedents'.

has said the opposite before. Under cover of overruling "only" a single decision, today's opinion smashes a hundred-plus years of legal rulings to smithereens.

II

So how does the majority defend taking down *Williamson County* and its many precursors? Its decision rests on four ideas: a comparison between takings claims and other constitutional claims, a resort to the Takings Clause's text, and theories about two lines of this Court's precedent. All are misguided. The majority uses the term "shaky foundations." *Ante*, at 204. It knows whereof it speaks.

The first crack comes from the repeated assertion (already encountered in the majority's Fourth Amendment analogy, see *supra*, at 209) that *Williamson County* treats takings claims worse than other claims founded in the Bill of Rights. See *ante*, at 189, 191, 194, 202. That is not so. The distinctive aspects of litigating a takings claim merely reflect the distinctive aspects of the constitutional right. Once again, a Fourth Amendment claim arises at the moment a police officer uses excessive force, because the Constitution prohibits that thing and that thing only. (Similarly, for the majority's other analogies, a bank robber commits his offense when he robs a bank and a tortfeasor when he acts negligently—because that conduct, and it alone, is what the law forbids.) Or to make the same point a bit differently, even if a government could compensate the victim in advance—as the majority requires here—the victim would still suffer constitutional injury when the force is used. But none of that is true of Takings Clause violations. That kind of infringement, as explained, is complete only after *two* things occur: (1) the government takes property, and (2) it fails to pay just compensation. See *supra*, at 209. All *Williamson County* and its precursors do is recognize that fact, by saying that a constitutional claim (and thus a §1983 suit) arises only after the second condition is met—when the property owner

comes away from the government's compensatory procedure empty-handed. That is to treat the Takings Clause exactly as its dual elements require—and because that is so, neither worse nor better than any other right.

Second, the majority contends that its rule follows from the constitutional text, because the Takings Clause does not say "[n]or shall private property be taken for public use, without an available procedure that will result in compensation." *Ante*, at 189. There is a reason the majority devotes only a few sentences to that argument. Because here's another thing the text does not say: "Nor shall private property be taken for public use, without advance or contemporaneous payment of just compensation, notwithstanding ordinary procedures." In other words, the text no more states the majority's rule than it does *Williamson County*'s (and its precursors'). As constitutional text often is, the Takings Clause is spare. It says that a government taking property must pay just compensation—but does not say through exactly what mechanism or at exactly what time. That was left to be worked out, consistent with the Clause's (minimal) text and purpose. And from 1890 until today, this Court worked it out *Williamson County*'s way, rather than the majority's. See *supra*, at 209–210. Under our caselaw, a government could use reliable post-taking compensatory mechanisms (with payment calculated from the taking) without violating the Takings Clause.

Third, the majority tries to explain away that mass of precedent, with a theory so, well, inventive that it appears in neither the petitioner's nor her 15-plus *amici*'s briefs. Don't read the decisions "too broadly," the majority says. *Ante*, at 198. Yes, the Court in each rejected a takings claim, instructing the property owner to avail herself instead of a government-created compensatory mechanism. But all the Court meant (the majority says) was that the plaintiffs had sought the wrong kind of relief: They could not get injunctions because the available compensatory procedures gave

an adequate remedy at law. The Court still believed (so says the majority) that the cases involved constitutional violations. Or said otherwise (again, according to the majority), the Court still understood the Takings Clause to prohibit delayed payment.

Points for creativity, but that is just not what the decisions say. Most of the cases involved requests for injunctions, but the equity/law distinction played little or no role in our analyses. Instead, the decisions addressed directly what the Takings Clause requires (or not). And as already shown, *supra*, at 209–210, they held that the Clause does not demand advance payment. Beginning again at the beginning, *Cherokee Nation* decided that the Takings Clause "does not provide or require that compensation shall be actually paid in advance." 135 U. S., at 659. In *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 567–568 (1898), the Court declared that a property owner had no "constitutional right to have the amount of his compensation finally determined and paid before yielding possession." By the time of *Williams* v. *Parker*, 188 U. S., at 502, the Court could state that "it is settled by repeated decisions" that the Constitution allows the taking of property "prior to any payment." Similarly, in *Joslin Mfg. Co.* v. *Providence*, 262 U. S. 668, 677 (1923), the Court noted that "[i]t has long been settled that the taking of property . . . need not be accompanied or preceded by payment, but that the requirement of just compensation is satisfied when" there is a pledge of "reasonably prompt ascertainment and payment." In *Hurley* v. *Kincaid*, 285 U. S. 95, 104 (1932), the Court repeated that the "Fifth Amendment does not entitle [a property owner] to be paid in advance of the taking." I could go on—there are eighty more years to cover, and more decisions in the early years too—but by now you probably get the idea.

Well, just one more especially good demonstration. In *Yearsley* v. *W. A. Ross Constr. Co.*, 309 U. S. 18 (1940), the plaintiffs sought money damages for an alleged Takings

Clause violation. For that reason, the Court's theory about suits seeking injunctions has no possible application. Still, the Court rejected the claim: The different remedy requested made no difference in the result. And yet more important: In refusing to find a Takings Clause violation, the Court used the exact same reasoning as it had in all the cases requesting injunctions. Once again, the Court did not focus on the nature of the relief sought. It simply explained that the government had provided a procedure for obtaining post-taking compensation—and that was enough. "The Fifth Amendment does not entitle him [the owner] to be paid in advance of the taking," held the Court, quoting the last injunction case described above. *Id.*, at 21 (quoting *Hurley*, 285 U. S., at 104; brackets in original). Because the government had set up an adequate compensatory mechanism, the taking was "within [the government's] constitutional power." 309 U. S., at 22. Once again, the opposite of what the majority pronounces today.[4]

Fourth and finally, the majority lays claim to another line of decisions—involving the Tucker Act—but with no greater success. The Tucker Act waives the Federal Government's

[4] The majority's supposed best case to the contrary, *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304 (1987), is not so good, as is apparent from its express statement that it accords with *Williamson County*. See 482 U. S., at 320, n. 10. In *First English*, the Court held that a property owner was entitled to compensation for the temporary loss of his property, occurring while a (later-repealed) regulation was in effect. See *id.*, at 321. The Court made clear that a government's duty to compensate for a taking—including a temporary taking—arises from the Fifth Amendment, as of course it does. See *id.*, at 315. But the Court nowhere suggested that a Fifth Amendment violation happens even before a government denies the required compensation. (You will scan the majority's description of *First English* in vain for a quote to that effect—because no such quote exists. See *ante*, at 191–193.) To the contrary, the Court went out of its way to recognize the *Williamson County* principle that "no constitutional violation occurs until just compensation has been denied." 482 U. S., at 320, n. 10 (internal quotation marks omitted).

sovereign immunity and grants the Court of Federal Claims jurisdiction over suits seeking compensation for takings. See 28 U. S. C. § 1491(a)(1). According to the majority, this Court's cases establish that such an action "*is* a claim for a violation of the Fifth Amendment"—that is, for a constitutional offense that has already happened because of the absence of advance payment. *Ante*, at 201, n. 7 (emphasis in original); see *ante*, at 196. But again, the precedents say the opposite. The Tucker Act is the Federal Government's equivalent of a State's inverse condemnation procedure, by which a property owner can obtain just compensation. The former, no less than the latter, *forestalls* any constitutional violation by ensuring that an owner gets full and fair payment for a taking. The Court, for example, stated in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121, 128 (1985), that "so long as [post-taking Tucker Act] compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional." Similarly, we held in *Preseault* v. *ICC*, 494 U. S. 1, 4–5 (1990), that when "compensation is available to [property owners] under the Tucker Act[,] the requirements of the Fifth Amendment are satisfied." And again, in *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1016 (1984), we rejected a takings claim because the plaintiff could "seek just compensation under the Tucker Act" and "[t]he Fifth Amendment does not require that compensation precede the taking." All those decisions (and there are others) rested on the premise, merely reiterated in *Williamson County*, that the "availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment." *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 697, n. 18 (1949).[5]

[5] *Jacobs* v. *United States*, 290 U. S. 13 (1933), the Tucker Act case the majority cites to support its argument, says nothing different. The majority twice notes *Jacobs*' statement that a Tucker Act claim "rest[s] upon the Fifth Amendment." *Ante*, at 190–191 (quoting 290 U. S., at 16). And so

To the extent it deals with these cases (mostly, it just ignores them), the majority says only that they (like *Williamson County*) were "confused" or wrong. See *ante*, at 196, 201, n. 7. But maybe the majority should take the hint: When a theory requires declaring precedent after precedent after precedent wrong, that's a sign the theory itself may be wrong. The majority's theory is just that.

III

And not only wrong on prior law. The majority's overruling of *Williamson County* will have two damaging consequences. It will inevitably turn even well-meaning government officials into lawbreakers. And it will subvert important principles of judicial federalism.

To begin with, today's decision means that government regulators will often have no way to avoid violating the Constitution. There are a "nearly infinite variety of ways" for regulations to "affect property interests." *Arkansas Game and Fish Comm'n* v. *United States*, 568 U. S. 23, 31 (2012). And under modern takings law, there is "no magic formula" to determine "whether a given government interference with property is a taking." *Ibid.* For that reason, a government actor usually cannot know in advance whether implementing a regulatory program will effect a taking, much less of whose property. Until today, such an official could do his work without fear of wrongdoing, in any jurisdiction that had set up a reliable means for property owners to obtain compensation. Even if some regulatory action turned out to take someone's property, the official would not have violated the Constitution. But no longer. Now, when a government undertakes land-use regulation (and what gov-

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it does, because the compensatory obligation that the Tucker Act vindicates arises from—or "rests upon"—the Fifth Amendment. But that is a far cry from saying, as the majority does, that the Government has already violated the Fifth Amendment when the Tucker Act claim is brought—before the Government has denied fair compensation.

ernment doesn't?), the responsible employees will almost inescapably become constitutional malefactors. That is not a fair position in which to place persons carrying out their governmental duties.

Still more important, the majority's ruling channels to federal courts a (potentially massive) set of cases that more properly belongs, at least in the first instance, in state courts—where *Williamson County* put them. The regulation of land use, this Court has stated, is "perhaps the quintessential state activity." *FERC* v. *Mississippi*, 456 U. S. 742, 768, n. 30 (1982). And a claim that a land-use regulation violates the Takings Clause usually turns on state-law issues. In that respect, takings claims have little in common with other constitutional challenges. The question in takings cases is not merely whether a given state action meets federal constitutional standards. Before those standards can come into play, a court must typically decide whether, under state law, the plaintiff has a property interest in the thing regulated. See *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 164 (1998); see also Sterk, The Demise of Federal Takings Litigation, 48 Wm. & Mary L. Rev. 251, 288 (2006) ("[I]f background state law did not recognize or create property in the first instance, then a subsequent state action cannot take property"). Often those questions—how does pre-existing state law define the property right?; what interests does that law grant?; and conversely what interests does it deny?—are nuanced and complicated. And not a one of them is familiar to federal courts.

This case highlights the difficulty. The ultimate constitutional question here is: Did Scott Township's cemetery ordinance "go[ ] too far" (in Justice Holmes's phrase), so as to effect a taking of Rose Mary Knick's property? *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922). But to answer that question, it is first necessary to address an issue about background state law. In the Township's view, the ordinance did little more than codify Pennsylvania common

law, which (the Township says) has long required property owners to make land containing human remains open to the public. See Brief for Respondents 48; Brief for Cemetery Law Scholars as *Amici Curiae* 6–26. If the Township is right on that state-law question, Knick's constitutional claim will fail: The ordinance, on that account, didn't go far at all. But Knick contends that no common law rule of that kind exists in Pennsylvania. See Reply Brief 22. And if she is right, her takings claim may yet have legs. But is she? Or is the Township? I confess: I don't know. Nor, I would venture, do my colleagues on the federal bench. But under today's decision, it will be the Federal District Court for the Middle District of Pennsylvania that will have to resolve this question of local cemetery law.

And if the majority thinks this case is an outlier, it's dead wrong; indeed, this case will be easier than many. Take *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003 (1992). There, this Court held that a South Carolina ban on development of beachfront property worked a taking of the plaintiff's land—unless the State's nuisance law already prohibited such development. See *id.*, at 1027–1030. The Court then—quite sensibly—remanded the case to the South Carolina Supreme Court to resolve that question. See *id.*, at 1031–1032. (And while spotting the nuisance issue, the Court may have overlooked other state-law constraints on development. In some States, for example, the public trust doctrine or public prescriptive easements limit the development of beachfront land. See Sterk, The Federalist Dimension of Regulatory Takings Jurisprudence, 114 Yale L. J. 203, 227 (2004).) Or consider *Stop the Beach Renourishment, Inc.* v. *Florida Dept. of Environmental Protection*, 560 U. S. 702 (2010). The federal constitutional issue there was whether a decision of the Florida Supreme Court relating to beachfront property constituted a taking. To resolve that issue, though, the Court first had to address whether, under pre-existing Florida property law, "littoral-property owners

had rights to future accretions and contact with the water superior to the State's right to fill in its submerged land." *Id.*, at 730. The Court bit the bullet and decided that issue itself, as it sometimes has to (though thankfully with the benefit of a state high court's reasoning). But there is no such necessity here—and no excuse for making complex state-law issues part of the daily diet of federal district courts.

State courts are—or at any rate, are supposed to be—the "ultimate expositors of state law." *Mullaney* v. *Wilbur*, 421 U. S. 684, 691 (1975). The corollary is that federal courts should refrain whenever possible from deciding novel or difficult state-law questions. That stance, as this Court has long understood, respects the "rightful independence of the state governments," "avoid[s] needless friction with state policies," and promotes "harmonious relation[s] between state and federal authority." *Railroad Comm'n of Tex.* v. *Pullman Co.*, 312 U. S. 496, 500–501 (1941). For that reason, this Court has promoted practices of certification and abstention to put difficult state-law issues in state judges' hands. See, *e. g.*, *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 77 (1997) (encouraging certification of "novel or unsettled questions of state law" to "hel[p] build a cooperative judicial federalism"); *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U. S. 25, 28 (1959) (approving federal-court abstention in an eminent domain proceeding because such cases "turn on legislation with much local variation interpreted in local settings"). We may as well not have bothered. Today's decision sends a flood of complex state-law issues to federal courts. It makes federal courts a principal player in local and state land-use disputes. It betrays judicial federalism.

IV

Everything said above aside, *Williamson County* should stay on the books because of *stare decisis*. Adherence to precedent is "a foundation stone of the rule of law." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 798

(2014). "[I]t promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). *Stare decisis*, of course, is "not an inexorable command." *Id.*, at 828. But it is not enough that five Justices believe a precedent wrong. Reversing course demands a "special justification—over and above the belief that the precedent was wrongly decided." *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 456 (2015) (internal quotation marks omitted). The majority offers no reason that qualifies.

In its only real stab at a special justification, the majority focuses on what it calls the "*San Remo* preclusion trap." *Ante*, at 185. As the majority notes, this Court held in a post-*Williamson County* decision interpreting the full faith and credit statute, 28 U. S. C. § 1738, that a state court's resolution of an inverse condemnation proceeding has preclusive effect in a later federal suit. See *San Remo Hotel, L. P.* v. *City and County of San Francisco*, 545 U. S. 323 (2005); *ante*, at 184–185, 188–189, 204–205. The interaction between *San Remo* and *Williamson County* means that "many takings plaintiffs never have the opportunity to litigate in a federal forum." *Ante*, at 204. According to the majority, that unanticipated result makes *Williamson County* itself "unworkable." *Ibid.*

But in highlighting the preclusion concern, the majority only adds to the case for respecting *stare decisis*—because that issue can always be addressed by Congress. When "correction can be had by legislation," Justice Brandeis once stated, the Court should let stand even "error[s on] matter[s] of serious concern." *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U. S. 409, 424 (1986) (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (dissenting)). Or otherwise said, *stare decisis* then "carries enhanced force." *Kimble*, 576 U. S., at 456; see *South Dakota* v. *Wayfair, Inc.*, 585 U. S. 162, 192 (2018) (ROBERTS, C. J.,

dissenting) (The *stare decisis* "bar is even higher" when Congress "can, if it wishes, override this Court's decisions with contrary legislation"). Here, Congress can reverse the *San Remo* preclusion rule any time it wants, and thus give property owners an opportunity—*after* a state-court proceeding—to litigate in federal court. The *San Remo* decision, as noted above, interpreted the federal full faith and credit statute; Congress need only add a provision to that law to flip the Court's result. In fact, Congress has already considered proposals responding to *San Remo*—though so far to no avail. See Brief for Congressman Steve King et al. as *Amici Curiae* 7. Following this Court's normal rules of practice means leaving the *San Remo* "ball[in] Congress's court," so that branch can decide whether to pick it up. *Kimble*, 576 U. S., at 456.[6]

And the majority has no other special justification. It says *Williamson County* did not create "reliance interests." *Ante*, at 205. But even if so, those interests are a *plus-factor* in the doctrine; when they exist, *stare decisis* becomes "superpowered." *Kimble*, 576 U. S., at 458; *Payne*, 501 U. S., at 828 (*Stare decisis* concerns are "at their acme" when "reliance interests are involved"). The absence of reliance is not itself a reason for overruling a decision. Next, the majority says that the "justification for [*Williamson County*'s] state-litigation requirement" has "evolve[d]." *Ante*, at 204. But to start with, it has not. The original rationale—in the majority's words, that the requirement "is an element of a takings claim," *ibid.*—has held strong for 35 years (including in the cases the majority cites), and is the same one I rely on today. See, *e. g.*, *Horne*, 569 U. S., at 525–526 (quoting

[6] Confronted with that point, the majority shifts ground. It notes that even if Congress eliminated the *San Remo* rule, takings plaintiffs would still have to comply with *Williamson County*'s "unjustified" demand that they bring suit in state court first. See *ante*, at 204–205. But that argument does not even purport to state a special justification. It merely reiterates the majority's view on the merits.

Williamson County's rationale); *Suitum* v. *Tahoe Regional Planning Agency*, 520 U. S. 725, 734 (1997) (same); *supra*, at 209. And anyway, "evolution" in the way a decision is described has never been a ground for abandoning *stare decisis*. Here, the majority's only citation is to last Term's decision overruling a 40-year-old precedent. See *ante*, at 204 (citing *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878, 906 (2018)). If that is the way the majority means to proceed—relying on one subversion of *stare decisis* to support another—we may as well not have principles about precedents at all.

What is left is simply the majority's view that *Williamson County* was wrong. The majority repurposes all its merits arguments—all its claims that *Williamson County* was "ill founded"—to justify its overruling. *Ante*, at 203. But the entire idea of *stare decisis* is that judges do not get to reverse a decision just because they never liked it in the first instance. Once again, they need a reason *other than* the idea "that the precedent was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. 258, 266 (2014); see *supra*, at 221–222. For it is hard to overstate the value, in a country like ours, of stability in the law.

Just last month, when the Court overturned another longstanding precedent, JUSTICE BREYER penned a dissent. See *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. 230, 241 (2019). He wrote of the dangers of reversing legal course "only because five Members of a later Court" decide that an earlier ruling was incorrect. *Id.*, at 261. He concluded: "Today's decision can only cause one to wonder which cases the Court will overrule next." *Ibid.* Well, that didn't take long. Now one may wonder yet again.

Syllabus

REHAIF *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 17–9560. Argued April 23, 2019—Decided June 21, 2019

Petitioner Rehaif entered the United States on a nonimmigrant student visa to attend university but was dismissed for poor grades. He subsequently shot two firearms at a firing range. The Government prosecuted him under 18 U. S. C. § 922(g), which makes it unlawful for certain persons, including aliens illegally in the country, to possess firearms, and § 924(a)(2), which provides that anyone who "knowingly violates" the first provision can be imprisoned for up to 10 years. The jury at Rehaif's trial was instructed that the Government was not required to prove that he knew that he was unlawfully in the country. It returned a guilty verdict. The Eleventh Circuit affirmed.

Held: In a prosecution under § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm. Pp. 228–237.

(a) Whether a criminal statute requires the Government to prove that the defendant acted knowingly is a question of congressional intent. This inquiry starts from a longstanding presumption that Congress intends to require a defendant to possess a culpable mental state regarding "each of the statutory elements that criminalize otherwise innocent conduct," *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72, normally characterized as a presumption in favor of "scienter." There is no convincing reason to depart from this presumption here.

The statutory text supports the presumption. It specifies that a defendant commits a crime if he "knowingly" violates § 922(g), which makes possession of a firearm unlawful when the following elements are satisfied: (1) a status element (here "being an alien . . . illegally or unlawfully in the United States"); (2) a possession element (to "possess"); (3) a jurisdictional element ("in or affecting commerce"); and (4) a firearm element (a "firearm or ammunition"). Aside from the jurisdictional element, which is not subject to the presumption in favor of scienter, § 922(g)'s text simply lists the elements that make a defendant's behavior criminal. The term "knowingly" is normally read "as applying to all the subsequently listed elements of the crime." *Flores-Figueroa* v. *United States*, 556 U. S. 646, 650. And the "knowingly" requirement clearly applies to § 922(g)'s possession element, which follows the status

element in the statutory text. There is no basis for interpreting "knowingly" as applying to the second § 922(g) element but not the first.

This reading of the statute is also consistent with a basic principle underlying the criminal law: the importance of showing what Blackstone called "a vicious will." Scienter requirements advance this principle by helping to separate wrongful from innocent acts. That is the case here. Possessing a gun can be entirely innocent. It is the defendant's *status*, not his conduct alone, that makes the difference. Without knowledge of that status, a defendant may lack the intent needed to make his behavior wrongful. Pp. 228–232.

(b) The Government's arguments to the contrary are unpersuasive. In claiming that Congress does not normally require defendants to know their own status, it points to statutes where the defendant's status is not the "crucial element" separating innocent from wrongful conduct. *X-Citement Video*, 513 U. S., at 73. Those statutes are quite different from the provisions at issue here, where the defendant's status separates innocent from wrongful conduct. The Government also argues that whether an alien is "illegally or unlawfully in the United States" is a question of law, not fact, and thus appeals to the maxim that "ignorance of the law" is no excuse. But that maxim normally applies where a defendant possesses the requisite mental state in respect to the elements of the crime but claims to be unaware of a law forbidding his conduct. That maxim does not normally apply where a defendant's mistaken impression about a collateral legal question causes him to misunderstand his conduct's significance, thereby negating an element of the offense. Rehaif's status as an alien "illegally or unlawfully in the United States" refers to what commentators call a "collateral" question of law, and a mistake regarding that status negates an element of the offense. Finally, the statutory and legislative history on which the Government relies is at best inconclusive. Pp. 232–236.

888 F. 3d 1138, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, SOTOMAYOR, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 238.

Rosemary Cakmis argued the cause for petitioner. With her on the briefs were *Donna Lee Elm*, *Robert Godfrey*, *Adeel Bashir*, *Conrad Kahn*, *Virginia A. Seitz*, *Jeffrey T. Green*, and *Sarah O'Rourke Schrup*.

Allon Kedem argued the cause for the United States. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Benczkowski*, *Eric J. Feigin*, *Jenny C. Ellickson*, and *Joshua K. Handell*.*

JUSTICE BREYER delivered the opinion of the Court.

A federal statute, 18 U. S. C. § 922(g), provides that "[i]t shall be unlawful" for certain individuals to possess firearms. The provision lists nine categories of individuals subject to the prohibition, including felons and aliens who are "illegally or unlawfully in the United States." *Ibid.* A separate provision, § 924(a)(2), adds that anyone who "*knowingly* violates" the first provision shall be fined or imprisoned for up to 10 years. (Emphasis added.)

The question here concerns the scope of the word "knowingly." Does it mean that the Government must prove that a defendant knew both that he engaged in the relevant conduct (that he possessed a firearm) and also that he fell within the relevant status (that he was a felon, an alien unlawfully in this country, or the like)? We hold that the word "knowingly" applies both to the defendant's conduct and to the defendant's status. To convict a defendant, the Government therefore must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it.

I

Petitioner Hamid Rehaif entered the United States on a nonimmigrant student visa to attend university. After he

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**David Oscar Markus*, *Thomas W. Hillier II*, and *Erin K. Earl* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

Eric A. Tirschwell filed a brief for Everytown for Gun Safety as *amicus curiae* urging affirmance.

Charles Roth filed a brief for the National Immigrant Justice Center as *amicus curiae*.

received poor grades, the university dismissed him and told him that his "'immigration status'" would be terminated unless he transferred to a different university or left the country. 888 F. 3d 1138, 1141 (CA11 2018). Rehaif did neither.

Rehaif subsequently visited a firing range, where he shot two firearms. The Government learned about his target practice and prosecuted him for possessing firearms as an alien unlawfully in the United States, in violation of § 922(g) and § 924(a)(2). At the close of Rehaif's trial, the judge instructed the jury (over Rehaif's objection) that the "United States is not required to prove" that Rehaif "knew that he was illegally or unlawfully in the United States." *Ibid.* (internal quotation marks omitted). The jury returned a guilty verdict, and Rehaif was sentenced to 18 months' imprisonment.

Rehaif appealed. He argued that the judge erred in instructing the jury that it did not need to find that he knew he was in the country unlawfully. The Court of Appeals for the Eleventh Circuit, however, concluded that the jury instruction was correct, and it affirmed Rehaif's conviction. See *id.*, at 1148. The Court of Appeals believed that the criminal law generally does not require a defendant to know his own status, and further observed that no court of appeals had required the Government to establish a defendant's knowledge of his status in the analogous context of felon-in-possession prosecutions. *Id.*, at 1145–1146.

We granted certiorari to consider whether, in prosecutions under § 922(g) and § 924(a)(2), the Government must prove that a defendant knows of his status as a person barred from possessing a firearm. We now reverse.

II

Whether a criminal statute requires the Government to prove that the defendant acted knowingly is a question of congressional intent. See *Staples* v. *United States*, 511 U. S. 600, 605 (1994). In determining Congress' intent, we start

from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding "each of the statutory elements that criminalize otherwise innocent conduct." *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); see also *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952). We normally characterize this interpretive maxim as a presumption in favor of "scienter," by which we mean a presumption that criminal statutes require the degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission." Black's Law Dictionary 1547 (10th ed. 2014).

We apply the presumption in favor of scienter even when Congress does not specify any scienter in the statutory text. See *Staples*, 511 U. S., at 606. But the presumption applies with equal or greater force when Congress includes a general scienter provision in the statute itself. See ALI, Model Penal Code § 2.02(4), p. 22 (1985) (when a statute "prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears").

A

Here we can find no convincing reason to depart from the ordinary presumption in favor of scienter. The statutory text supports the presumption. The text of § 924(a)(2) says that "[w]hoever knowingly violates" certain subsections of § 922, including § 922(g), "shall be" subject to penalties of up to 10 years' imprisonment. The text of § 922(g) in turn provides that it "shall be unlawful for any person . . . , being an alien . . . illegally or unlawfully in the United States," to "possess in or affecting commerce, any firearm or ammunition."

The term "knowingly" in § 924(a)(2) modifies the verb "violates" and its direct object, which in this case is § 922(g).

The proper interpretation of the statute thus turns on what it means for a defendant to know that he has "violate[d]" § 922(g). With some here-irrelevant omissions, § 922(g) makes possession of a firearm or ammunition unlawful when the following elements are satisfied: (1) a status element (in this case, "being an alien . . . illegally or unlawfully in the United States"); (2) a possession element (to "possess"); (3) a jurisdictional element ("in or affecting commerce"); and (4) a firearm element (a "firearm or ammunition").

No one here claims that the word "knowingly" modifies the statute's jurisdictional element. Jurisdictional elements do not describe the "evil Congress seeks to prevent," but instead simply ensure that the Federal Government has the constitutional authority to regulate the defendant's conduct (normally, as here, through its Commerce Clause power). *Luna Torres* v. *Lynch*, 578 U. S. 452, 467 (2016). Because jurisdictional elements normally have nothing to do with the wrongfulness of the defendant's conduct, such elements are not subject to the presumption in favor of scienter. See *id.*, at 468.

Jurisdictional element aside, however, the text of § 922(g) simply lists the elements that make a defendant's behavior criminal. As "a matter of ordinary English grammar," we normally read the statutory term "'knowingly' as applying to all the subsequently listed elements of the crime." *Flores-Figueroa* v. *United States*, 556 U. S. 646, 650 (2009); see also *id.*, at 652 (we "ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element"). This is notably not a case where the modifier "knowingly" introduces a long statutory phrase, such that questions may reasonably arise about how far into the statute the modifier extends. See *id.*, at 659 (ALITO, J., concurring in part and concuring in judgment). And everyone agrees that the word "knowingly" applies to § 922(g)'s possession element, which is situated after the status element. We see no basis to interpret "knowingly" as

applying to the second § 922(g) element but not the first. See *United States* v. *Games-Perez*, 667 F. 3d 1136, 1143 (CA10 2012) (Gorsuch, J., concurring in judgment). To the contrary, we think that by specifying that a defendant may be convicted only if he "knowingly violates" § 922(g), Congress intended to require the Government to establish that the defendant knew he violated the material elements of § 922(g).

B

Beyond the text, our reading of § 922(g) and § 924(a)(2) is consistent with a basic principle that underlies the criminal law, namely, the importance of showing what Blackstone called "a vicious will." 4 W. Blackstone, Commentaries on the Laws of England 21 (1769). As this Court has explained, the understanding that an injury is criminal only if inflicted knowingly "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette*, 342 U. S., at 250. Scienter requirements advance this basic principle of criminal law by helping to "separate those who understand the wrongful nature of their act from those who do not." *X-Citement Video*, 513 U. S., at 73, n. 3.

The cases in which we have emphasized scienter's importance in separating wrongful from innocent acts are legion. See, *e. g.*, *id.*, at 70; *Staples*, 511 U. S., at 610; *Liparota* v. *United States*, 471 U. S. 419, 425 (1985); *United States* v. *Bailey*, 444 U. S. 394, 406, n. 6 (1980); *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 436 (1978); *Morissette*, 342 U. S., at 250–251. We have interpreted statutes to include a scienter requirement even where the statutory text is silent on the question. See *Staples*, 511 U. S., at 605. And we have interpreted statutes to include a scienter requirement even where "the most grammatical reading of the statute" does not support one. *X-Citement Video*, 513 U. S., at 70.

Applying the word "knowingly" to the defendant's status in § 922(g) helps advance the purpose of scienter, for it helps to separate wrongful from innocent acts. Assuming compliance with ordinary licensing requirements, the possession of a gun can be entirely innocent. See *Staples*, 511 U. S., at 611. It is therefore the defendant's *status*, and not his conduct alone, that makes the difference. Without knowledge of that status, the defendant may well lack the intent needed to make his behavior wrongful. His behavior may instead be an innocent mistake to which criminal sanctions normally do not attach. Cf. O. Holmes, The Common Law 3 (1881) ("[E]ven a dog distinguishes between being stumbled over and being kicked").

We have sometimes declined to read a scienter requirement into criminal statutes. See *United States* v. *Balint*, 258 U. S. 250, 254 (1922). But we have typically declined to apply the presumption in favor of scienter in cases involving statutory provisions that form part of a "regulatory" or "public welfare" program and carry only minor penalties. See *Staples*, 511 U. S., at 606; *Morissette*, 342 U. S., at 255–259. The firearms provisions before us are not part of a regulatory or public welfare program, and they carry a potential penalty of 10 years in prison that we have previously described as "harsh." *X-Citement Video*, 513 U. S., at 72. Hence, this exception to the presumption in favor of scienter does not apply.

III

The Government's arguments to the contrary do not convince us that Congress sought to depart from the normal presumption in favor of scienter.

The Government argues that Congress does not normally require defendants to know their own status. But the Government supports this claim primarily by referring to statutes that differ significantly from the provisions at issue here. One of these statutes prohibits "an officer, employee, contractor, or consultant of the United States" from misappropriating classified information. 18 U. S. C. § 1924(a).

Another statute applies to anyone "at least eighteen years of age" who solicits a minor to help avoid detection for certain federal crimes. 21 U. S. C. § 861(a)(2). A third applies to a "parent [or] legal guardian" who allows his child to be used for child pornography. 18 U. S. C. § 2251(b).

We need not decide whether we agree or disagree with the Government's interpretation of these statutes. In the provisions at issue here, the defendant's status is the "crucial element" separating innocent from wrongful conduct. *X-Citement Video*, 513 U. S., at 73. But in the statutes cited by the Government, the conduct prohibited—misappropriating classified information, seeking to evade detection for certain federal crimes, and facilitating child pornography—would be wrongful irrespective of the defendant's status. This difference assures us that the presumption in favor of scienter applies here even assuming the Government is right that these other statutes do not require knowledge of status.

Nor do we believe that Congress would have expected defendants under § 922(g) and § 924(a)(2) to know their own statuses. If the provisions before us were construed to require no knowledge of status, they might well apply to an alien who was brought into the United States unlawfully as a small child and was therefore unaware of his unlawful status. Or these provisions might apply to a person who was convicted of a prior crime but sentenced only to probation, who does not know that the crime is "*punishable* by imprisonment for a term exceeding one year." § 922(g)(1) (emphasis added); see also *Games-Perez*, 667 F. 3d, at 1138 (defendant held strictly liable regarding his status as a felon even though the trial judge had told him repeatedly—but incorrectly—that he would "leave this courtroom not convicted of a felony"). As we have said, we normally presume that Congress did not intend to impose criminal liability on persons who, due to lack of knowledge, did not have a wrongful mental state. And we doubt that the obligation to prove a defendant's knowledge of his status will be as burdensome

as the Government suggests. See *Staples*, 511 U. S., at 615–616, n. 11 ("[K]nowledge can be inferred from circumstantial evidence").

The Government also argues that whether an alien is "illegally or unlawfully in the United States" is a question of law, not fact, and thus appeals to the well-known maxim that "ignorance of the law" (or a "mistake of law") is no excuse. *Cheek* v. *United States*, 498 U. S. 192, 199 (1991).

This maxim, however, normally applies where a defendant has the requisite mental state in respect to the elements of the crime but claims to be "unaware of the existence of a statute proscribing his conduct." 1 W. LaFave & A. Scott, Substantive Criminal Law § 5.1(a), p. 575 (1986). In contrast, the maxim does not normally apply where a defendant "has a mistaken impression concerning the legal effect of some collateral matter and that mistake results in his misunderstanding the full significance of his conduct," thereby negating an element of the offense. *Ibid.*; see also Model Penal Code § 2.04, at 27 (a mistake of law is a defense if the mistake negates the "knowledge . . . required to establish a material element of the offense"). Much of the confusion surrounding the ignorance-of-the-law maxim stems from "the failure to distinguish [these] two quite different situations." LaFave, Substantive Criminal Law § 5.1(d), at 585.

We applied this distinction in *Liparota*, where we considered a statute that imposed criminal liability on "whoever knowingly uses, transfers, acquires, alters, or possesses" food stamps "in any manner not authorized by the statute or the regulations." 471 U. S., at 420 (quotation altered). We held that the statute required scienter not only in respect to the defendant's use of food stamps, but also in respect to whether the food stamps were used in a "manner not authorized by statute or regulations." *Id.*, at 425, n. 9. We therefore required the Government to prove that the defendant knew that his use of food stamps was unlawful—even though that was a question of law. See *ibid.*

This case is similar. The defendant's status as an alien "illegally or unlawfully in the United States" refers to a legal matter, but this legal matter is what the commentators refer to as a "collateral" question of law. A defendant who does not know that he is an alien "illegally or unlawfully in the United States" does not have the guilty state of mind that the statute's language and purposes require.

The Government finally turns for support to the statutory and legislative history. Congress first enacted a criminal statute prohibiting particular categories of persons from possessing firearms in 1938. See Federal Firearms Act, 52 Stat. 1250. In 1968, Congress added new categories of persons subject to the prohibition. See Omnibus Crime Control and Safe Streets Act, 82 Stat. 197. Then, in 1986, Congress passed the statute at issue here, the Firearms Owners' Protection Act, 100 Stat. 449, note following 18 U. S. C. § 921, which reorganized the prohibition on firearm possession and added the language providing that only those who violate the prohibition "knowingly" may be held criminally liable.

The Government says that, prior to 1986, the courts had reached a consensus that the law did not require the Government to prove scienter regarding a defendant's status. And the Government relies on the interpretive canon providing that when particular statutory language has received a settled judicial construction, and Congress subsequently reenacts that "same language," courts should presume that Congress intended to ratify the judicial consensus. *Helsinn Healthcare S. A.* v. *Teva Pharmaceuticals USA, Inc.*, 586 U. S. 123, 131 (2019).

Prior to 1986, however, there was no definitive judicial consensus that knowledge of status was not needed. This Court had not considered the matter. As the Government says, most lower courts had concluded that the statute did not require knowledge of status. See, *e. g.*, *United States* v. *Pruner*, 606 F. 2d 871, 874 (CA9 1979). But the Sixth Circuit had held to the contrary, specifically citing the risk that

a defendant "may not be aware of the fact" that barred him from possessing a firearm. *United States* v. *Renner*, 496 F. 2d 922, 926 (1974). And the Fourth Circuit had found that knowledge of a defendant's status was not needed because the statute "[b]y its terms" did not require knowledge of status. *United States* v. *Williams*, 588 F. 2d 92 (1978) (*per curiam*).

This last-mentioned circumstance is important. Any pre-1986 consensus involved the statute as it read prior to 1986—without any explicit scienter provision. But Congress in 1986 added a provision clarifying that a defendant could be convicted only if he violated the prohibition on firearm possession "knowingly." This addition, which would serve no apparent purpose under the Government's view, makes it all but impossible to draw any inference that Congress intended to ratify a pre-existing consensus when, in 1986, it amended the statute.

The Government points to the House Report on the legislation, which says that the 1986 statute would require the Government to prove "that the defendant's *conduct* was knowing." H. R. Rep. No. 99–495, p. 10 (1986) (emphasis added). Although this statement speaks of "conduct" rather than "status," context suggests that the Report may have meant the former to include the latter. In any event, other statements suggest that the word "knowingly" was intended to apply to both conduct and status. The Senate Report, for example, says that the proposed amendments sought to exclude "individuals who lack all criminal intent and knowledge," without distinguishing between conduct and status. S. Rep. No. 97–476, p. 15 (1982). And one Senate sponsor of the bill pointed out that the absence of a scienter requirement in the prior statutes had resulted in "severe penalties for unintentional missteps." 132 Cong. Rec. 9590 (1986) (statement of Sen. Hatch).

Thus, assuming without deciding that statutory or legislative history could overcome the longstanding presumption in favor of scienter, that history here is at best inconclusive.

* * *

The Government asks us to hold that any error in the jury instructions in this case was harmless. But the lower courts did not address that question. We therefore leave the question for those courts to decide on remand. See *Thacker* v. *TVA*, 587 U. S. 218, 228 (2019) (citing *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005)).

We conclude that in a prosecution under 18 U. S. C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm. We express no view, however, about what precisely the Government must prove to establish a defendant's knowledge of status in respect to other § 922(g) provisions not at issue here. See *post*, at 250–252 (ALITO, J., dissenting) (discussing other statuses listed in § 922(g) not at issue here). We accordingly reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX

18 U. S. C. § 924(a)(2)

"Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (*o*) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both."

18 U. S. C. § 922(g)

"It shall be unlawful for any person—

"(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

"(2) who is a fugitive from justice;

"(3) who is an unlawful user of or addicted to any controlled substance . . . ;

"(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

"(5) who, being an alien—(A) is illegally or unlawfully in the United States; or (B) . . . has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U. S. C. 1101(a)(26)));

"(6) who has been discharged from the Armed Forces under dishonorable conditions;

"(7) who, having been a citizen of the United States, has renounced his citizenship;

"(8) who is subject to a court order that—(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

"(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

The Court casually overturns the long-established interpretation of an important criminal statute, 18 U. S. C. § 922(g), an interpretation that has been adopted by every

single Court of Appeals to address the question. That interpretation has been used in thousands of cases for more than 30 years. According to the majority, every one of those cases was flawed. So today's decision is no minor matter. And § 922(g) is no minor provision. It probably does more to combat gun violence than any other federal law. It prohibits the possession of firearms by, among others, convicted felons, mentally ill persons found by a court to present a danger to the community, stalkers, harassers, perpetrators of domestic violence, and illegal aliens.

Today's decision will make it significantly harder to convict persons falling into some of these categories, and the decision will create a mountain of problems with respect to the thousands of prisoners currently serving terms for § 922(g) convictions. Applications for relief by federal prisoners sentenced under § 922(g) will swamp the lower courts. A great many convictions will be subject to challenge, threatening the release or retrial of dangerous individuals whose cases fall outside the bounds of harmless-error review. See *ante*, at 237.

If today's decision were compelled by the text of § 922(g) or by some other clear indication of congressional intent, what the majority has done would be understandable. We must enforce the laws enacted by Congress even if we think that doing so will bring about unfortunate results. But that is not the situation in this case. There is no sound basis for today's decision. Indeed, there was no good reason for us to take this case in the first place. No conflict existed in the decisions of the lower courts, and there is no evidence that the established interpretation of § 922(g) had worked any serious injustice.

The push for us to grant review was based on the superficially appealing but ultimately fallacious argument that the text of § 922(g) dictates the interpretation that the majority now reaches. See Pet. for Cert. 8. Ironically, today's deci-

sion, while casting aside the established interpretation of § 922(g), does not claim that the text of that provision is itself dispositive. Instead, what the majority relies on, in the end, is its own guess about *congressional intent*. And the intent that the majority attributes to Congress is one that Congress almost certainly did not harbor.

I

The majority provides a bowdlerized version of the facts of this case and thus obscures the triviality of this petitioner's claim. The majority wants readers to have in mind an entirely imaginary case, a heartless prosecution of "an alien who was brought into the United States unlawfully as a small child and was therefore unaware of his unlawful status." *Ante*, at 233. Such a defendant would indeed warrant sympathy, but that is not petitioner, and no one has called to our attention any real case like the one the majority conjures up.

Here is what really happened. Petitioner, a citizen of the United Arab Emirates, entered this country on a visa that allowed him to stay here lawfully only so long as he remained a full-time student. 888 F. 3d 1138, 1140 (CA11 2018). He enrolled at the Florida Institute of Technology, but he withdrew from or failed all of his classes and was dismissed. Brief for Petitioner 4–5. After he was conditionally readmitted, he failed all but one of his courses. His enrollment was then terminated, and he did not appeal. The school sent him e-mails informing him that he was no longer enrolled and that, unless he was admitted elsewhere, his status as a lawful alien would be terminated. 888 F. 3d, at 1140–1141. Petitioner's response was to move to a hotel and frequent a firing range. Each evening he checked into the hotel and always demanded a room on the eighth floor facing the airport. Each morning he checked out and paid his bill with cash, spending a total of more than $11,000. This went on

for 53 days. Brief for United States 4. A hotel employee told the FBI that petitioner claimed to have weapons in his room. Arrested and charged under § 922(g) for possession of a firearm by an illegal alien, petitioner claimed at trial that the Government had to prove beyond a reasonable doubt that he actually knew that his lawful status had been terminated. Following what was then the universal and long-established interpretation of § 922(g), the District Court rejected this argument, and a jury found him guilty. 888 F. 3d, at 1141. The Eleventh Circuit affirmed. *Id.*, at 1140. Out of the more than 8,000 petitions for a writ of certiorari that we expected to receive this Term, we chose to grant this one to see if petitioner had been deprived of the right to have a jury decide whether, in his heart of hearts, he really knew that he could not lawfully remain in the United States on a student visa when he most certainly was no longer a student.

II

A

Petitioner claims that the texts of § 922(g) and a companion provision, 18 U. S. C. § 924(a)(2), dictate a decision in his favor, and I therefore begin with the text of those two provisions. Section 924(a)(2) provides in relevant part as follows:

> "Whoever *knowingly* violates subsection . . . (g) of section 922 shall be fined as provided in this title, imprisoned for not more than 10 years, or both." (Emphasis added.)

Section 922(g), in turn, makes it unlawful for nine categories of persons to engage in certain interstate-commerce-related conduct involving firearms. These categories consist of: (1) convicted felons; (2) fugitives from justice; (3) users of illegal drugs or addicts; (4) persons found to have very serious mental problems; (5) illegal aliens; (6) individu-

als who were dishonorably discharged from the Armed Forces; (7) persons who renounced U. S. citizenship; (8) stalkers, harassers, and abusers subject to restraining orders; and (9) persons convicted of a misdemeanor crime of domestic violence.[1] Persons falling into these categories are forbid-

[1] Title 18 U. S. C. § 922(g) provides as follows:

"It shall be unlawful for any person—

"(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

"(2) who is a fugitive from justice;

"(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U. S. C. 802));

"(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

"(5) who, being an alien—

"(A) is illegally or unlawfully in the United States; or

"(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U. S. C. 1101(a)(26)));

"(6) who has been discharged from the Armed Forces under dishonorable conditions;

"(7) who, having been a citizen of the United States, has renounced his citizenship;

"(8) who is subject to a court order that—

"(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

"(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

"(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

"(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

"(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

"to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm

den, as relevant here, to "possess in or affecting commerce, any firearm."

Petitioner argues that, when §§ 924(a)(2) and 922(g) are put together, they unambiguously show that a defendant must actually know that he falls into one of the nine enumerated categories. But this purportedly textual argument requires some moves that cannot be justified on the basis of the statutory text. Petitioner's argument tries to hide those moves in the manner of a sleight-of-hand artist at a carnival.

Petitioner begins by extracting the term "knowingly" from § 924(a)(2). He then transplants it into the beginning of § 922(g), ignores the extraordinarily awkward prose that this surgery produces, and proclaims that because "knowingly" appears at the beginning of the enumeration of the elements of the § 922(g) offense, we must assume that it modifies the first of those elements, *i. e.*, being a convicted felon, illegal alien, etc. To conclude otherwise, he contends, is to commit the sin of having the term "knowingly" leap over that element and then land conveniently in front of the second. Pet. for Cert. 8.

But petitioner's reading is guilty of the very sort of leaping that it condemns—and then some. It has "knowingly" performed a jump of Olympian proportions, taking off from § 924(a)(2), sailing backward over more than 9,000 words in the U. S. Code, and then landing—conveniently—at the beginning of the enumeration of the elements of the § 922(g) offense. Of course, there is no logical reason why this jump has to land at that particular point in § 922(g). That is petitioner's first sleight of hand. But there is another.

What petitioner and those who have pressed this leaping argument want § 922(g) to say is essentially this: Whoever knowingly is an illegal alien and possesses a firearm shall be fined and/or imprisoned if his possession of the gun was in

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or ammunition which has been shipped or transported in interstate or foreign commerce."

or affecting interstate commerce. If we had before us a provision that reads like that, there would be a strong textual argument that a defendant's status as an illegal alien must actually be known to him. That is essentially what we held in *Flores-Figueroa* v. *United States*, 556 U. S. 646, 652 (2009). But when the term "knowingly" is excised from § 924(a)(2) and inserted at the beginning of § 922(g), what we get is something quite different:

> **Whoever knowingly** . . . It is unlawful for any person . . . who, being an alien—is illegally or unlawfully in the United States . . . to possess in or affecting commerce, any firearm or ammunition . . . .

Congress did not—and certainly would not—enact a statute that reads like that. To convert this garbled conglomeration into intelligible prose, editing is obviously needed, and the editing process would compel the editor to make decisions with substantive implications that could hardly go unnoticed. Here is a way of amalgamating §§ 924(a)(1) and 922(g) that minimizes the changes in the language of the two provisions:

> **Whoever knowingly** . . . ~~It is unlawful for any person . . . who,~~ being an alien—is illegally or unlawfully in the United States . . . **and** possess**es** in or affecting commerce, any firearm or ammunition . . . [commits a crime punishable by . . . .]

The most natural reading of this version is that the defendant must know only that he is an alien, not that his presence in the country is illegal or unlawful. And under this version, it is not even clear that the alien's possession of the firearm or ammunition must be knowing—even though everyone agrees that this is required.

Here are two other possibilities that require more changes. The first is this:

> **Whoever knowingly** . . . ~~It is unlawful for any person . . . who,~~ being an alien **who**—is illegally or unlawfully in the United States . . . ~~to~~ possess**es** in or affecting commerce, any firearm or ammunition . . . [commits a crime punishable by . . . .]

The second, which differs from the first only in that the clause "who is illegally or unlawfully in the United States" is set off by commas, is this:

> **Whoever knowingly** . . . ~~It is unlawful for any person . . . who,~~ being an alien**, who**—is illegally or unlawfully in the United States**,** . . . ~~to~~ possess**es** in or affecting commerce, any firearm or ammunition . . . [commits a crime punishable by . . . .]

A strict grammarian, noting that the clause "who is legally or unlawfully in the United States" is restrictive in the first of these versions and nonrestrictive in the second, might interpret the first to favor petitioner and the second to favor the Government. And under both of these versions, it is again unclear whether a defendant's possession of the firearm or ammunition must be knowing.

All of the versions discussed so far place the term "knowingly" at the beginning of our transformed version of § 922(g), but as noted, there is no reason why this term's leap from § 924(a)(2) must land at that point. So our new version of § 922(g) could just as logically read like this:

> **Whoever** . . . ~~It is unlawful for any person . . . who,~~ being an alien **who**—is illegally or unlawfully in the United States . . . ~~to~~ **knowingly** possess**es** in or affecting commerce, any firearm or ammunition . . . [commits a crime punishable by . . . .]

That would make it clear that the long-established interpretation of § 922(g) is correct.

What these possibilities show is that any attempt to combine the relevant language from § 924(a)(2) with the language of § 922(g) necessarily entails significant choices that are not dictated by the text of those provisions. So the purportedly textualist argument that we were sold at the certiorari stage comes down to this: If §§ 922(g) and 924(a)(2) are arbitrarily combined in the way that petitioner prefers, then, presto chango, they support petitioner's interpretation. What a magic trick!

B

The truth behind the illusion is that the terms used in §§ 924(a)(2) and 922(g), when read in accordance with their use in ordinary speech, can easily be interpreted to treat the question of *mens rea* in at least four different ways.

First, the language of §§ 924(a)(2) and 922(g) can be read to require that a defendant know that his conduct is a violation of § 922(g). In ordinary speech, to knowingly violate a rule may mean to violate a known rule. ("He was told it is forbidden to smoke in the restroom of a plane, but he knowingly did so.") Neither petitioner nor the Government suggests that this is the proper interpretation of §§ 922(g) and 924(a)(2), but their reason is not based on the plain or ordinary meaning of the statutory text. Instead, it rests on an inference about congressional intent that, in turn, is based on a drafting convention, namely, that where Congress wants to require proof that a criminal defendant knew his conduct was illegal, it specifies that the violation must be "willful." In ordinary speech, "willfulness" does not require or even suggest knowledge of illegality. See Webster's Third New International Dictionary 2617 (1976). But we have construed the term as used in statutes to mean the "intentional violation of a known legal duty." *United States* v. *Bishop*, 412 U. S. 346, 360 (1973). Thus, the pointed use of the term "knowingly," as opposed to "willfully," in § 922(g), provides a ground to infer that Congress did not mean to require knowledge of illegality.

Second, a "knowing" violation could require knowledge of *every* element that makes up the offense. As applied to § 922(g), that would mean that the Government would have to prove that the defendant: (1) knew that he is an alien "illegally or unlawfully in the United States," (2) knew that the thing he "possess[ed]" was "a firearm or ammunition," and (3) knew that what he did was "in or affecting commerce." But again, the parties (and the majority) disclaim this reading because, they contend, the *mens rea* requirement does not apply to the interstate-commerce element of the offense. To reach this conclusion, however, neither the parties nor the majority relies on the text. How could they? If positioning the term "knowingly" at the beginning of a list of elements (or incorporating it through a separate provision) means that it applies to every element, then it would have to apply to the interstate-commerce element just like the others.

Once again, the conclusion that "knowingly" does not apply to the interstate-commerce element is not based on any rule of English usage but on yet another inference about congressional intent: that the question whether a defendant knew that his act of possessing a gun or ammunition was "in or affecting commerce" is simply not the sort of question that Congress wanted a jury to decide. The conclusion is sound, see, *e. g.*, *Luna Torres* v. *Lynch*, 578 U. S. 452, 467 (2016). But the inference that this is not what Congress intended is in no way compelled by the text of § 922(g), which simply includes the jurisdictional element among the other elements of the crime with no textual indication that Congress meant for it to be treated differently.[2]

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[2] Indeed, the jurisdictional element is listed before the firearm element of the offense, to which everyone agrees the *mens rea* requirement applies. The text alone does not explain why the word "knowingly" would "leap-fro[g]" over the middle element, which is perhaps why the majority does not adopt the novel "grammatical gravity" canon. *United States* v. *Games-Perez*, 667 F. 3d 1136, 1143 (CA10 2012) (Gorsuch, J., concurring in judgment); see also Tr. of Oral Arg. 32.

Third, a "knowing" violation could require knowledge of both the conduct and status elements of the offense (but not the jurisdictional element). This is the reading that petitioner advocates and that the majority adopts. Yet again, this interpretation is not based on the text of the provisions but on two other factors: the inference about congressional intent just discussed and the assumption that Congress, had it incorporated the term "knowingly" into § 922(g), would have placed it at the beginning of that provision. As I have explained, there is no textual basis for that assumption.

Fourth, a "knowing" violation could require knowledge of the conduct element—the possession of a firearm or ammunition—but not the others. Putting aside the question of the jurisdictional element, that is how one would naturally read § 922(g) if Congress had incorporated the knowledge requirement into § 922(g) *after* the status element and *just before* the conduct element. Of course, Congress did not do that—but neither did it place "knowingly" at the beginning of the list of elements.

As these competing alternatives show, the statutory text alone does not tell us with any degree of certainty the particular elements of § 922(g) to which the term "knowingly" applies. And once it is recognized that the statutory text does not specify the *mens rea* applicable to § 922(g)'s status element, there is no reason to assume that what Congress wanted was either a ***very high*** *mens rea* requirement (actual knowledge) or no *mens rea* at all. See *infra*, at 259. However, if we limit ourselves to those options, as the parties and the majority assume we must, the latter is more likely.

C

1

That is so for at least six reasons. *First*, in no prior case have we inferred that Congress intended to impose a *mens rea* requirement on an element that concerns the defendant's own status. Nor has petitioner pointed to any statute with

text that plainly evinces such a congressional intent. Instead, in instances in which Congress has expressly incorporated a *mens rea* requirement into a provision with an element involving the defendant's status, it has placed the *mens rea* requirement *after* the status element. For example, 18 U. S. C. § 2251(b) punishes any "person having custody or control of a minor who knowingly permits such minor to engage in . . . sexually explicit conduct for the purpose of producing any visual depiction of such conduct." To show a violation, the Government need not prove that the defendant knew that the person under his custody or control was a minor. Even where the issue of a defendant's status is open and shut, Congress has taken pains to place the *mens rea* requirement so that it clearly does not apply to the status element. Thus, 18 U. S. C. § 1924(a) punishes an "officer, employee, contractor, or consultant of the United States [who] knowingly removes [classified] documents or materials without authority." And 21 U. S. C. § 861(a) prohibits "any person at least eighteen years of age [from] knowingly and intentionally . . . receiv[ing] a controlled substance from a person under 18 years of age." So what the majority has done in this case is groundbreaking.

Second, there are sound reasons for treating § 922(g)'s status element like its jurisdictional element. The parties agree that federal criminal statutes presumptively do not require proof that an accused knew that his conduct satisfied a jurisdictional element, and our cases support this proposition. See *Luna Torres*, 578 U. S. 452; *United States* v. *Yermian*, 468 U. S. 63 (1984); *United States* v. *Feola*, 420 U. S. 671 (1975). We have never provided a comprehensive explanation of the basis for this presumption, but our decision in *Feola*, which concerned the offense of assaulting a federal officer in violation of 18 U. S. C. § 111, is instructive. Agreeing with the interpretation that had been adopted with "practical unanimity" by the courts of appeals, *Feola* held that an accused need not be shown to have been aware of his

victim's status. We inferred that this is what the statute means because requiring proof of knowledge would undermine the statute's dual objectives of protecting federal officers and preventing the obstruction of law enforcement. 420 U. S., at 677, 679.

A similar consideration appears to provide the basis for the conclusion that a § 922(g) defendant need not know that his possession of a gun is "in or affecting commerce." Whether or not conduct satisfies that requirement involves a complicated legal question; requiring proof of such knowledge would threaten to effectively exempt almost everyone but students of constitutional law from the statute's reach; and that would obviously defeat the statute's objectives.

The reason for the rule exempting knowledge of jurisdictional elements supports the conclusion that knowledge of § 922(g)'s status element is also not required. Whether a defendant falls into one of the § 922(g) categories often involves complicated legal issues, and demanding proof that a defendant understood those issues would seriously undermine the statute's goals.

Take the category defined in § 922(g)(4), which applies to a person who has been "adjudicated as a mental defective," a term that is defined by regulation to mean

> "(a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:
>
> "(1) Is a danger to himself or to others; or
>
> "(2) Lacks the mental capacity to contract or manage his own affairs." 27 CFR § 478.11 (2019).

Congress thought that persons who fall into this category lack the intellectual capacity to possess firearms safely. Is it likely that Congress wanted § 922(g) to apply only to those individuals who nevertheless have the capacity to know that

they fall within the complicated definition set out in the regulation? If a person has been found by a court to present a "danger . . . to others" due to mental illness or incompetency, should he escape the reach of § 922(g) because he does not know that a court has so found?

Or consider the category defined by § 922(g)(8), which applies to a person

> "who is subject to a court order that—
>
> "(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
>
> "(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
>
> "(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
>
> "(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury . . . ."

Under this reticulated provision, does the majority's interpretation require proof beyond a reasonable doubt that the defendant knew, when he possessed the gun or ammunition, (1) that his restraining order had been issued after a hearing, (2) that he had received actual notice of the hearing, (3) that he had been given an opportunity to participate at the hearing, (4) that the order covered harassing, stalking, or threatening, (5) that the person protected by the order qualified as his "intimate partner," and (6) that the order explicitly prohibited the "use, attempted use, or threatened use of physical force"? Did Congress want a person who terror-

ized an intimate partner to escape conviction under § 922(g) by convincing a jury that he was so blinded by alcohol, drugs, or sheer rage that he did not actually *know* some of these facts when he acquired a gun?

What about the category defined by § 922(g)(9), which covers a person "who has been convicted in any court of a misdemeanor crime of domestic violence"? Did Congress want this provision to apply only to those abusers who actually know that an offense for which they were convicted falls within the complicated definition of a "crime of domestic violence"? The Members of this Court have been unable to agree on the meaning of that concept. Is it limited to offenses that have an element requiring proof that the abuser had a domestic relationship with the victim? In *United States* v. *Hayes*, 555 U. S. 415 (2009), the majority said no, but THE CHIEF JUSTICE and Justice Scalia disagreed. Can a conviction qualify if the offense required only recklessness? In *Voisine* v. *United States*, 579 U. S. 686 (2016), the Court said yes, but JUSTICE THOMAS and JUSTICE SOTOMAYOR dissented. Does this provision apply if only slight force is required for conviction by the misdemeanor provision under which the defendant was convicted? Again, the Members of the Court have disagreed. Compare *United States* v. *Castleman*, 572 U. S. 157, 162 (2014) (opinion of the Court), with *id.*, at 175 (Scalia, J., concurring in part and concurring in judgment). If the Justices of this Court, after briefing, argument, and careful study, disagree about the meaning of a "crime of domestic violence," would the majority nevertheless require the Government to prove at trial that the defendant himself actually knew that his abuse conviction qualified? Can this be what Congress had in mind when it added this category in 1996 to combat domestic violence?

Serious problems will also result from requiring proof that an alien *actually knew*—not should have known or even strongly suspected but *actually knew*—that his continued presence in the country was illegal. Consider a variation on

the facts of the present case. An alien admitted on a student visa does little if any work in his courses. When his grades are sent to him at the end of the spring semester, he deliberately declines to look at them. Over the summer, he receives correspondence from the college, but he refuses to open any of it. He has good reason to know that he has probably flunked out and that, as a result, his visa is no longer good. But he doesn't *actually know* that he is not still a student. Does that take him outside § 922(g)(8)? Is it likely that this is what Congress wanted?

That is most doubtful. Congress enacted § 922(g)'s status-based restrictions because of its judgment that specific classes of people are "potentially irresponsible and dangerous" and therefore should be prohibited from owning or possessing firearms and ammunition. *Barrett* v. *United States*, 423 U. S. 212, 218 (1976). It is highly unlikely that Congress wanted defendants to be able to escape liability under this provision by deliberately failing to verify their status.

Third, while the majority's interpretation would frustrate Congress's public safety objectives in cases involving some of the § 922(g) status categories, in prosecutions under the most frequently invoked category, possession by a convicted felon, the majority's interpretation will produce perverse results. A felony conviction is almost always followed by imprisonment, parole or its equivalent, or at least a fine. Juries will rarely doubt that a defendant convicted of a felony has forgotten that experience, and therefore requiring the prosecution to prove that the defendant knew that he had a prior felony conviction will do little for defendants. But if the prosecution must prove such knowledge to the satisfaction of a jury, then under our decision in *Old Chief* v. *United States*, 519 U. S. 172 (1997), it is questionable whether a defendant, by offering to stipulate that he has a prior conviction, can prevent the prosecution from offering evidence about the nature of that offense. And the admission of that information may work to a § 922(g) defendant's detriment.

Old Chief recognized that a party is generally entitled to admit evidence to prove a necessary fact even if the opposing party offers to stipulate to that fact, *id.*, at 186–190, but the Court held that a § 922(g) defendant's offer to stipulate to the fact that he had a prior felony conviction precluded the prosecution from offering evidence about the identity of that offense. This holding appears to rest on the understanding that § 922(g) requires proof of status but not of knowledge. See *id.*, at 190 (suggesting that a prosecutor would be entitled to seek admission of evidence of the nature of a prior felony if offered to prove knowledge). So if a defendant's knowledge is now necessary, the logic of *Old Chief* is undermined.

Fourth, the majority's interpretation of § 922(g) would lead to an anomaly that Congress is unlikely to have intended. Another provision of § 922—*i. e.*, § 922(d)(5)(A)—prohibits firearms sellers from selling to persons who fall within a § 922(g) category, but this provision does not require proof that the seller had actual knowledge of the purchaser's status. It is enough if the seller had "reasonable cause" to know that a purchaser fell into a prohibited category. A person who falls into one of the § 922(g) categories is more likely to understand his own status than is a person who sells this individual a gun. Accordingly, it is hard to see why an individual who may fall into one of the § 922(g) categories should have less obligation to verify his own situation than does the person who sells him a gun. Yet that is where the majority's interpretation leads.

Fifth, the legal landscape at the time of § 922(g)'s enactment weighs strongly against the majority's reading. Long before Congress added the term "knowingly" to § 924(a)(2), federal law prohibited certain categories of people from possessing firearms. See Federal Firearms Act, 52 Stat. 1250; Act of Oct. 3, 1961, Pub. L. 87–342, 75 Stat. 757; Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90–351, 82 Stat. 197; Gun Control Act of 1968, Pub. L. 90–618, 82

Stat. 1213, note following 18 U. S. C. § 921. These predecessors of § 922(g) did not expressly include any *mens rea* requirement, but courts generally interpreted them to require proof that a defendant acted knowingly in receiving, transporting, or possessing a firearm. The courts did not, however, require proof that a defendant knew that he fell within one of the covered categories or that his conduct satisfied the statutes' interstate-commerce requirement. See, *e. g.*, *United States* v. *Santiesteban*, 825 F. 2d 779, 782–783 (CA4 1987); *United States* v. *Schmitt*, 748 F. 2d 249, 252 (CA5 1984); *United States* v. *Oliver*, 683 F. 2d 224, 229 (CA7 1982); *United States* v. *Lupino*, 480 F. 2d 720, 723–724 (CA8 1973); *United States* v. *Pruner*, 606 F. 2d 871, 873–874 (CA9 1979).[3]

During this same period, many States adopted similar laws,[4] and no State's courts interpreted such a law to require knowledge of the defendant's status. See, *e. g.*, *People* v. *Nieto*, 247 Cal. App. 2d 364, 368, 55 Cal. Rptr. 546, 549 (1966). *People* v. *Tenorio*, 197 Colo. 137, 144–145, 590 P. 2d 952, 957 (1979); *State* v. *Harmon*, 25 Ariz. App. 137, 139, 541 P. 2d 600, 602 (1975); *State* v. *Heald*, 382 A. 2d 290, 297 (Me. 1978); *Williams* v. *State*, 565 P. 2d 46, 49 (Okla. Crim. App. 1977).

All this case law formed part of the relevant backdrop of which we assume Congress was aware when it enacted § 924(a)(2)'s *mens rea* requirement in 1986. See Firearms Owners' Protection Act, 100 Stat. 449, note following 18 U. S. C. § 921. "We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent."

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[3] The majority highlights a single case where the Sixth Circuit did require knowledge that the defendant was under indictment, out of a concern about secret indictments. *Ante*, at 235–236 (citing *United States* v. *Renner*, 496 F. 2d 922, 924, 927 (1974)). But Congress addressed this concern separately when it enacted the *mens rea* requirement. It moved the provision involving indictments to its own statutory subsection, § 922(n), and punished only willful violations, see § 924(a)(1)(D).

[4] See Brief for Everytown for Gun Safety as *Amicus Curiae* 6–8.

Ryan v. *Valencia Gonzales*, 568 U. S. 57, 66 (2013) (internal quotation marks omitted). Where all the Federal Courts of Appeals and all the state courts of last resort to have interpreted statutes prohibiting certain classes of persons from possessing firearms agreed that knowledge of status was not required, it is fair to expect Congress to legislate more clearly than it has done here if it seeks to deviate from those holdings. Adding the *mens rea* provision in § 924(a)(2) "clarif[ied]" that knowledge is the required *mens rea* with respect to a defendant's conduct, *ante*, at 236, but it did not indicate any disagreement with the established consensus that already applied that *mens rea* to § 922(g)'s conduct element but not to the element of the defendant's status.[5]

Finally, the judgment of the courts of appeals should count for something. In *Feola*, the Court cited the "practical unanimity" of the courts of appeals, 420 U. S., at 677; see also *Luna Torres*, 578 U. S., at 468 and here, even after Congress added the *mens rea* requirement, all the courts of appeals to address the question have held that it does not apply to the defendant's status.[6] In addition, the decisions of the

[5] Contrary to the majority's suggestion, *ante*, at 235–236, the addition of the *mens rea* requirement does serve a purpose under this interpretation: It codifies the holdings of the lower courts that knowledge is required for the conduct element. If Congress had left § 922(g) off the list of offenses requiring knowledge in § 924(a)(2), some may have invoked *expressio unius* to argue that a violation of § 922(g) required no *mens rea* at all. Cf. A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 107 (2012).

[6] See *United States* v. *Smith*, 940 F. 2d 710, 713 (CA1 1991); *United States* v. *Huet*, 665 F. 3d 588, 596 (CA3 2012); *United States* v. *Langley*, 62 F. 3d 602, 604–608 (CA4 1995) (en banc); *United States* v. *Rose*, 587 F. 3d 695, 705–706, and n. 9 (CA5 2009) (*per curiam*); *United States* v. *Dancy*, 861 F. 2d 77, 80–82 (CA5 1988) (*per curiam*); *United States* v. *Lane*, 267 F. 3d 715, 720 (CA7 2001); *United States* v. *Thomas*, 615 F. 3d 895, 899 (CA8 2010); *United States* v. *Kind*, 194 F. 3d 900, 907 (CA8 1999); *United States* v. *Miller*, 105 F. 3d 552, 555 (CA9 1997); *Games-Perez*, 667 F. 3d, at 1142; *United States* v. *Capps*, 77 F. 3d 350, 352–354 (CA10 1996); *United States* v. *Jackson*, 120 F. 3d 1226, 1229

highest courts of States with laws similar to § 922(g) have continued to unanimously interpret those provisions in the same way.[7]

2

Petitioner contends that all the Courts of Appeals to address the question now before us have gone astray because they have not given proper weight to the presumption that a *mens rea* requirement applies to every element of an offense that results in the criminalization of otherwise innocent conduct. See *Elonis* v. *United States*, 575 U. S. 723 (2015); *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64 (1994); *Morissette* v. *United States*, 342 U. S. 246 (1952). This concern, which also animates much of the majority's analysis, is overstated.

The majority does not claim that the Constitution requires proof of *mens rea* for every status element or every element that has the effect of criminalizing what would otherwise be lawful conduct. Nor does it suggest that the presumption it invokes is irrebuttable for any other reason. That would be a radical conclusion because it has long been accepted that some status elements do not require knowledge. Laws that aim to protect minors, for example, often do not require proof that an offender had actual knowledge of the age of a minor who is the victim of a crime. "'The majority rule in the United States is that a defendant's knowledge of the age of a victim is not an essential element of statutory rape. . . . A defendant's good faith or reasonable belief that the victim is over the age of consent is simply no defense.'" *United States* v. *Gomez-Mendez*, 486 F. 3d 599, 603, n. 8 (CA9 2007). Similarly, 18 U. S. C. § 2243(a) makes it a crime, punishable by up to 15 years' imprisonment, knowingly to engage in a sexual act with a person who is between

(CA11 1997) (*per curiam*); *United States* v. *Bryant*, 523 F. 3d 349, 354 (CADC 2008).

[7] See Brief for Everytown for Gun Safety as *Amicus Curiae* 11–19 (collecting cases).

the ages of 12 and 16 and is at least four years younger than the accused. This statute expressly provides that knowledge of the victim's age need not be proved. § 2241(d). I do not understand the majority to suggest that these laws, which dispense with proof of knowledge for public safety purposes, are invalid.

Not only is there no blanket rule requiring proof of *mens rea* with respect to every element that distinguishes between lawful and unlawful conduct, but petitioner exaggerates in suggesting that the so-called jurisdictional elements in federal criminal statutes comply with this "rule" because they do no more than provide a hook for prosecuting a crime in federal court. These elements often do more than that. They sometimes transform lawful conduct into criminal conduct: In a State that chooses to legalize marijuana, possession is wrongful only if the defendant is on federal property. Cf. 41 CFR § 102–74.400 (2018). Jurisdictional elements may also drastically increase the punishment for a wrongful act. For example, the statute at issue in *Feola*, which criminalizes assault on a federal officer, doubles the possible prison sentence that would have been applicable to simple assault. Compare 18 U. S. C. § 111 with § 113. Just like a status element, a jurisdictional element can make the difference between some penalty and no penalty, or between significantly greater and lesser penalties.

Since a legislative body may enact a valid criminal statute with a strict-liability element, the dispositive question is whether it has done so or, in other words, whether the presumption that petitioner invokes is rebutted. This rebuttal can be done by the statutory text or other persuasive factors. See *Liparota* v. *United States*, 471 U. S. 419, 425 (1985) (applying presumption "[a]bsent indication of contrary purpose in the language or legislative history"); *X-Citement Video*, 513 U. S., at 70–72 (discussing statutory context in reaching conclusion); *Flores-Figueroa*, 556 U. S., at 652; *id.*, at 660 (ALITO, J., concurring in part and concurring in judg-

ment). And here, for the reasons discussed above, § 922(g) is best interpreted not to require proof that a defendant knew that he fell within one of the covered categories.

I add one last point about what can be inferred regarding Congress's intent. Once it becomes clear that statutory text alone does not answer the question that we face and we are left to infer Congress's intent based on other indicators, there is no reason why we must or should infer that Congress wanted the same *mens rea* to apply to all the elements of the § 922(g) offense. As we said in *Staples* v. *United States*, 511 U. S. 600, 609 (1994), "different elements of the same offense can require different mental states." And if Congress wanted to require proof of ***some*** *mens rea* with respect to the categories in § 922(g), there is absolutely no reason to suppose that it wanted to impose one of the highest degrees of *mens rea*—actual knowledge. Why not require reason to know or recklessness or negligence? To this question, neither petitioner nor the majority has any answer.

D

Because the context resolves the interpretive question, neither the canon of constitutional avoidance nor the rule of lenity can be invoked to dictate the result that the majority reaches. As to the canon, we have never held that the Due Process Clause requires *mens rea* for all elements of all offenses, and we have upheld the constitutionality of some strict-liability offenses in the past. See *United States* v. *Freed*, 401 U. S. 601 (1971); *United States* v. *Dotterweich*, 320 U. S. 277 (1943); *United States* v. *Balint*, 258 U. S. 250 (1922); *United States* v. *Behrman*, 258 U. S. 280 (1922). In any event, if the avoidance of a serious constitutional question required us to infer that some *mens rea* applies to § 922(g)'s status element, that would hardly justify bypassing lower levels of *mens rea* and going all the way to actual knowledge.

As for the rule of lenity, we resort to it "only if, after seizing everything from which aid can be derived, we can

make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U. S. 125, 138 (1998) (alterations and internal quotation marks omitted). And what I have just said about the constitutional avoidance canon applies equally to lenity: It cannot possibly justify requiring actual knowledge.

III

Although the majority presents its decision as modest, its practical effects will be far reaching and cannot be ignored. Tens of thousands of prisoners are currently serving sentences for violating 18 U. S. C. § 922(g).[8] It is true that many pleaded guilty, and for most direct review is over. Nevertheless, every one of those prisoners will be able to seek relief by one route or another. Those for whom direct review has not ended will likely be entitled to a new trial. Others may move to have their convictions vacated under 28 U. S. C. § 2255, and those within the statute of limitations will be entitled to relief if they can show that they are actually innocent of violating § 922(g), which will be the case if they did not know that they fell into one of the categories of persons to whom the offense applies. *Bousley* v. *United States*, 523 U. S. 614, 618–619 (1998). If a prisoner asserts that he lacked that knowledge and therefore was actually innocent, the district courts, in a great many cases, may be required to hold a hearing, order that the prisoner be brought to court from a distant place of confinement, and make a credibility determination as to the prisoner's subjective mental state at the time of the crime, which may have occurred years in the past. See *United States* v. *Garth*, 188 F. 3d 99, 109 (CA3 1999); *United States* v. *Jones*, 172 F. 3d 381, 384–385 (CA5 1999); *United States* v. *Hellbusch*, 147

[8] The U. S. Sentencing Commission reports that in fiscal year 2017 there were 6,032 offenders convicted under 18 U. S. C. § 922(g), with an average sentence of 64 months, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_in_Possession_FY17.pdf (as last visited June 19, 2019).

F. 3d 782, 784 (CA8 1998); *United States* v. *Benboe*, 157 F. 3d 1181, 1184 (CA9 1998). This will create a substantial burden on lower courts, who are once again left to clean up the mess the Court leaves in its wake as it moves on to the next statute in need of "fixing." Cf. *Mathis* v. *United States*, 579 U. S. 500, 507–508 (2016) (ALITO, J., dissenting).

Nor is there any reason to think that the Court's reasoning here will necessarily be limited to § 922(g). The Court goes out of its way to point out that it is not taking a position on the applicability of *mens rea* requirements in other status-based offenses, even where the statute lists the status *before* the *mens rea*. *Ante*, at 233.

* * *

The majority today opens the gates to a flood of litigation that is sure to burden the lower courts with claims for relief in a host of cases where there is no basis for doubting the defendant's knowledge. The majority's interpretation of § 922(g) is not required by the statutory text, and there is no reason to suppose that it represents what Congress intended.

I respectfully dissent.

Syllabus

NORTH CAROLINA DEPARTMENT OF REVENUE *v.* KIMBERLEY RICE KAESTNER 1992 FAMILY TRUST

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

No. 18–457. Argued April 16, 2019—Decided June 21, 2019

Joseph Lee Rice III formed a trust for the benefit of his children in his home State of New York and appointed a fellow New York resident as the trustee. The trust agreement granted the trustee "absolute discretion" to distribute the trust's assets to the beneficiaries. In 1997, Rice's daughter, Kimberley Rice Kaestner, moved to North Carolina. The trustee later divided Rice's initial trust into three separate subtrusts, and North Carolina sought to tax the Kimberley Rice Kaestner 1992 Family Trust (Trust)—formed for the benefit of Kaestner and her three children—under a law authorizing the State to tax any trust income that "is for the benefit of" a state resident, N. C. Gen. Stat. Ann. § 105–160.2. The State assessed a tax of more than $1.3 million for tax years 2005 through 2008. During that period, Kaestner had no right to, and did not receive, any distributions. Nor did the Trust have a physical presence, make any direct investments, or hold any real property in the State. The trustee paid the tax under protest and then sued the taxing authority in state court, arguing that the tax as applied to the Trust violates the Fourteenth Amendment's Due Process Clause. The state courts agreed, holding that the Kaestners' in-state residence was too tenuous a link between the State and the Trust to support the tax.

Held: The presence of in-state beneficiaries alone does not empower a State to tax trust income that has not been distributed to the beneficiaries where the beneficiaries have no right to demand that income and are uncertain to receive it. Pp. 268–279.

(a) The Due Process Clause limits States to imposing only taxes that "bea[r] fiscal relation to protection, opportunities and benefits given by the state." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444. Compliance with the Clause's demands "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax," and that "the 'income attributed to the State for tax purposes . . . be rationally related to "values connected with the taxing State,"'" *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 306. That "minimum connection" inquiry is "flexible" and focuses on the reasonableness of the government's action. *Id.*, at 307. Pp. 268–269.

(b) In the trust beneficiary context, the Court's due process analysis of state trust taxes focuses on the extent of the in-state beneficiary's

right to control, possess, enjoy, or receive trust assets. Cases such as *Safe Deposit & Trust Co. of Baltimore* v. *Virginia*, 280 U. S. 83; *Brooke* v. *Norfolk*, 277 U. S. 27; and *Maguire* v. *Trefry*, 253 U. S. 12, reflect a common principle: When a State seeks to base its tax on the in-state residence of a trust beneficiary, the Due Process Clause demands a pragmatic inquiry into what exactly the beneficiary controls or possesses and how that interest relates to the object of the State's tax. *Safe Deposit*, 280 U. S., at 91. Similar analysis also appears in the context of taxes premised on the in-state residency of settlors and trustees. See, *e. g.*, *Curry* v. *McCanless*, 307 U. S. 357. Pp. 270–274.

(c) Applying these principles here, the residence of the Trust beneficiaries in North Carolina alone does not supply the minimum connection necessary to sustain the State's tax. First, the beneficiaries did not receive any income from the Trust during the years in question. Second, they had no right to demand Trust income or otherwise control, possess, or enjoy the Trust assets in the tax years at issue. Third, they also could not count on necessarily receiving any specific amount of income from the Trust in the future. Pp. 274–276.

(d) The State's counterarguments are unconvincing. First, the State argues that "a trust and its constituents" are always "inextricably intertwined," and thus, because trustee residence supports state taxation, so too must beneficiary residence. The State emphasizes that beneficiaries are essential to a trust and have an equitable interest in its assets. Although a beneficiary is central to the trust relationship, the wide variation in beneficiaries' interests counsels against adopting such a categorical rule. Second, the State argues that ruling in favor of the Trust will undermine numerous state taxation regimes. But only a small handful of States rely on beneficiary residency as a sole basis for trust taxation, and an even smaller number rely on the residency of beneficiaries regardless of whether the beneficiary is certain to receive trust assets. Finally, the State urges that adopting the Trust's position will lead to opportunistic gaming of state tax systems. There is no certainty, however, that such behavior will regularly come to pass, and in any event, mere speculation about negative consequences cannot conjure the "minimum connection" missing between the State and the object of its tax. Pp. 277–279.

371 N. C. 133, 814 S. E. 2d 43, affirmed.

SOTOMAYOR, J., delivered the opinion for a unanimous Court. ALITO, J., filed a concurring opinion, in which ROBERTS, C. J., and GORSUCH, J., joined, *post*, p. 279.

Matthew W. Sawchak, Solicitor General of North Carolina, argued the cause for petitioner. With him on the briefs

were *Joshua H. Stein*, Attorney General, *James W. Doggett* and *Ryan Y. Park*, Deputy Solicitors General, *Robert F. Orr*, *Andrew H. Erteschik*, *Saad Gul*, and *John M. Durnovich*.

David A. O'Neil argued the cause for respondent. With him on the brief were *Anna A. Moody* and *Thomas Dean Myrick*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Minnesota et al. by *Keith Ellison*, Attorney General of Minnesota, and *John O'Mahoney*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Steve Marshall* of Alabama, *Xavier Becerra* of California, *Phil Weiser* of Colorado, *William Tong* of Connecticut, *Karl A. Racine* of the District of Columbia, *Christopher M. Carr* of Georgia, *Lawrence G. Wasden* of Idaho, *Kwame Raoul* of Illinois, *Tom Miller* of Iowa, *Dana Nessel* of Michigan, *Tim Fox* of Montana, *Doug Peterson* of Nebraska, *Grubir S. Grewal* of New Jersey, *Wayne Stenehjem* of North Dakota, *Dave Yost* of Ohio, *Mike Hunter* of Oklahoma, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Peter F. Neronha* of Rhode Island, and *Robert W. Ferguson* of Washington; for Law Professors by *Stephen D. Feldman* and *Thomas H. Segars*; and for Tax Law Professors by *Erik R. Zimmerman*.

Briefs of *amici curiae* urging affirmance were filed for the State of South Dakota et al. by *Jason R. Ravnsborg*, Attorney General of South Dakota, and *Paul S. Swedlund* and *Matthew W. Templar*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Jahna Lindemuth* of Alaska, *Aaron D. Ford* of Nevada, and *Ken Paxton* of Texas; for the American College of Tax Counsel by *C. Wells Hall III*, *Charles H. Mercer, Jr.*, and *Reed J. Hollander*; for Certain State Trust Associations et al. by *David M. Lehn*; for the Chamber of Commerce of the United States of America by *Andrew J. Pincus* and *Daniel E. Jones*; for the Council on State Taxation by *Fredrick Nicely*, *Nikki Dobay*, *Karl Frieden*, and *David Sawyer*; for the New York State Bar Association by *Robert M. Harper*, *Angelo M. Grasso*, *Jeffery H. Sheetz*, and *Lois Bladykas*; for Washington State Tax Practitioners by *Dirk Giseburt*, *pro se*; for Roberta Lea Brilmayer by *William D. Zabel*, *Catherine Grevers Schmidt*, and *John J. Rector*; and for William Fielding by *Walter A. Pickhardt* and *Nicholas J. Nelson*.

Briefs of *amici curiae* were filed for the American College of Trust Counsel et al. by *Robert W. Goldman*; and for Constitutional Law Scholars by *Alan B. Morrison*, *Allan Erbsen*, and *Darien Shanske*, all *pro se*.

JUSTICE SOTOMAYOR delivered the opinion of the Court.

This case is about the limits of a State's power to tax a trust. North Carolina imposes a tax on any trust income that "is for the benefit of" a North Carolina resident. N. C. Gen. Stat. Ann. §105–160.2 (2017). The North Carolina courts interpret this law to mean that a trust owes income tax to North Carolina whenever the trust's beneficiaries live in the State, even if—as is the case here—those beneficiaries received no income from the trust in the relevant tax year, had no right to demand income from the trust in that year, and could not count on ever receiving income from the trust. The North Carolina courts held the tax to be unconstitutional when assessed in such a case because the State lacks the minimum connection with the object of its tax that the Constitution requires. We agree and affirm. As applied in these circumstances, the State's tax violates the Due Process Clause of the Fourteenth Amendment.

I

A

In its simplest form, a trust is created when one person (a "settlor" or "grantor") transfers property to a third party (a "trustee") to administer for the benefit of another (a "beneficiary"). A. Hess, G. Bogert, & G. Bogert, Law of Trusts and Trustees §1, pp. 8–10 (3d ed. 2007). As traditionally understood, the arrangement that results is not a "distinct legal entity, but a 'fiduciary relationship' between multiple people." *Americold Realty Trust* v. *ConAgra Foods, Inc.*, 577 U. S. 378, 383 (2016). The trust comprises the separate interests of the beneficiary, who has an "equitable interest" in the trust property, and the trustee, who has a "legal interest" in that property. *Greenough* v. *Tax Assessors of Newport*, 331 U. S. 486, 494 (1947). In some contexts, however,

trusts can be treated as if the trust itself has "a separate existence" from its constituent parts. *Id.*, at 493.[1]

The trust that challenges North Carolina's tax had its first incarnation nearly 30 years ago, when New Yorker Joseph Lee Rice III formed a trust for the benefit of his children. Rice decided that the trust would be governed by the law of his home State, New York, and he appointed a fellow New York resident as the trustee.[2] The trust agreement provided that the trustee would have "absolute discretion" to distribute the trust's assets to the beneficiaries "in such amounts and proportions" as the trustee might "from time to time" decide. Art. I, § 1.2(a), App. 46–47.

When Rice created the trust, no trust beneficiary lived in North Carolina. That changed in 1997, when Rice's daughter, Kimberley Rice Kaestner, moved to the State. She and her minor children were residents of North Carolina from 2005 through 2008, the time period relevant for this case.

A few years after Kaestner moved to North Carolina, the trustee divided Rice's initial trust into three subtrusts. One of these subtrusts—the Kimberley Rice Kaestner 1992 Family Trust (Kaestner Trust or Trust)—was formed for the benefit of Kaestner and her three children. The same agreement that controlled the original trust also governed the Kaestner Trust. Critically, this meant that the trustee had exclusive control over the allocation and timing of trust distributions.

North Carolina explained in the state-court proceedings that the State's only connection to the Trust in the relevant tax years was the in-state residence of the Trust's beneficiaries. App. to Pet. for Cert. 54a. From 2005 through 2008, the trustee chose not to distribute any of the income that

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[1] Most notably, trusts are treated as distinct entities for federal taxation purposes. *Greenough*, 331 U. S., at 493; see *Anderson* v. *Wilson*, 289 U. S. 20, 26–27 (1933).

[2] This trustee later was succeeded by a new trustee who was a Connecticut resident during the relevant time period.

the Trust accumulated to Kaestner or her children, and the trustee's contacts with Kaestner were "infrequent."[3] 371 N. C. 133, 143, 814 S. E. 2d 43, 50 (2018). The Trust was subject to New York law, Art. X, App. 69, the grantor was a New York resident, App. 44, and no trustee lived in North Carolina, 371 N. C., at 134, 814 S. E. 2d, at 45. The trustee kept the Trust documents and records in New York, and the Trust asset custodians were located in Massachusetts. *Ibid.* The Trust also maintained no physical presence in North Carolina, made no direct investments in the State, and held no real property there. App. to Pet. for Cert. 52a–53a.

The Trust agreement provided that the Kaestner Trust would terminate when Kaestner turned 40, after the time period relevant here. After consulting with Kaestner and in accordance with her wishes, however, the trustee rolled over the assets into a new trust instead of distributing them to her. This transfer took place after the relevant tax years. See N. Y. Est., Powers & Trusts Law Ann. § 10–6.6(b) (West 2002) (authorizing this action).

B

North Carolina taxes any trust income that "is for the benefit of" a North Carolina resident. N. C. Gen. Stat. Ann. § 105–160.2. The North Carolina Supreme Court interprets the statute to authorize North Carolina to tax a trust on the sole basis that the trust beneficiaries reside in the State. 371 N. C., at 143–144, 814 S. E. 2d, at 51.

Applying this statute, the North Carolina Department of Revenue assessed a tax on the full proceeds that the Kaestner Trust accumulated for tax years 2005 through 2008 and required the trustee to pay it. See N. C. Gen. Stat.

[3] The state court identified only two meetings between Kaestner and the trustee in those years, both of which took place in New York. 371 N. C. 133, 143, 814 S. E. 2d 43, 50 (2018). The trustee also gave Kaestner accountings of trust assets and legal advice concerning the Trust. *Id.*, at 135, 814 S. E. 2d, at 45.

Ann. § 105–160.2. The resulting tax bill amounted to more than $1.3 million. The trustee paid the tax under protest and then sued in state court, arguing that the tax as applied to the Kaestner Trust violates the Due Process Clause of the Fourteenth Amendment.

The trial court decided that the Kaestners' residence in North Carolina was too tenuous a link between the State and the Trust to support the tax and held that the State's taxation of the Trust violated the Due Process Clause. App. to Pet. for Cert. 62a.[4] The North Carolina Court of Appeals affirmed, as did the North Carolina Supreme Court. A majority of the State Supreme Court reasoned that the Kaestner Trust and its beneficiaries "have legally separate, taxable existences" and thus that the contacts between the Kaestner family and their home State cannot establish a connection between the Trust "itself" and the State. 371 N. C., at 140–142, 814 S. E. 2d, at 49.

We granted certiorari to decide whether the Due Process Clause prohibits States from taxing trusts based only on the in-state residency of trust beneficiaries. 586 U. S. 1112 (2019).

II

The Due Process Clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." Amdt. 14, § 1. The Clause "centrally concerns the fundamental fairness of governmental activity." *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 312 (1992), overruled on other grounds, *South Dakota* v. *Wayfair, Inc.*, 585 U. S. 162, 176 (2018).

In the context of state taxation, the Due Process Clause limits States to imposing only taxes that "bea[r] fiscal rela-

[4] The trial court also held that North Carolina's tax violates the dormant Commerce Clause. The state appellate courts did not affirm on this basis, and we likewise do not address this challenge.

tion to protection, opportunities and benefits given by the state." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444 (1940). The power to tax is, of course, "essential to the very existence of government," *McCulloch* v. *Maryland*, 4 Wheat. 316, 428 (1819), but the legitimacy of that power requires drawing a line between taxation and mere unjustified "confiscation," *Miller Brothers Co.* v. *Maryland*, 347 U. S. 340, 342 (1954). That boundary turns on the "[t]he simple but controlling question . . . whether the state has given anything for which it can ask return." *Wisconsin*, 311 U. S., at 444.

The Court applies a two-step analysis to decide if a state tax abides by the Due Process Clause. First, and most relevant here, there must be "'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" *Quill*, 504 U. S., at 306. Second, "the 'income attributed to the State for tax purposes must be rationally related to "values connected with the taxing State."'" *Ibid.*[5]

To determine whether a State has the requisite "minimum connection" with the object of its tax, this Court borrows from the familiar test of *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945). *Quill*, 504 U. S., at 307. A State has the power to impose a tax only when the taxed entity has "certain minimum contacts" with the State such that the tax "does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe*, 326 U. S., at 316; see *Quill*, 504 U. S., at 308. The "minimum contacts" inquiry is "flexible" and focuses on the reasonableness of the government's action. *Id.*, at 307. Ultimately, only those who derive "benefits and protection" from associating with a State should have obligations to the State in question. *International Shoe*, 326 U. S., at 319.

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[5] Because North Carolina's tax on the Kaestner Trust does not meet *Quill*'s first requirement, we do not address the second.

III

One can imagine many contacts with a trust or its constituents that a State might treat, alone or in combination, as providing a "minimum connection" that justifies a tax on trust assets. The Court has already held that a tax on trust income distributed to an in-state resident passes muster under the Due Process Clause. *Maguire* v. *Trefry*, 253 U. S. 12, 16–17 (1920). So does a tax based on a trustee's in-state residence. *Greenough*, 331 U. S., at 498. The Court's cases also suggest that a tax based on the site of trust administration is constitutional. See *Hanson* v. *Denckla*, 357 U. S. 235, 251 (1958); *Curry* v. *McCanless*, 307 U. S. 357, 370 (1939).

A different permutation is before the Court today. The Kaestner Trust made no distributions to any North Carolina resident in the years in question. 371 N. C., at 134–135, 814 S. E. 2d, at 45. The trustee resided out of State, and Trust administration was split between New York (where the Trust's records were kept) and Massachusetts (where the custodians of its assets were located). *Id.*, at 134, 814 S. E. 2d, at 45. The trustee made no direct investments in North Carolina in the relevant tax years, App. to Pet. for Cert. 52a, and the settlor did not reside in North Carolina, 371 N. C., at 134, 814 S. E. 2d, at 45. Of all the potential kinds of connections between a trust and a State, the State seeks to rest its tax on just one: the in-state residence of the beneficiaries. Brief for Petitioner 34–36; see App. to Pet. for Cert. 54a.

We hold that the presence of in-state beneficiaries alone does not empower a State to tax trust income that has not been distributed to the beneficiaries where the beneficiaries have no right to demand that income and are uncertain ever to receive it. In limiting our holding to the specific facts presented, we do not imply approval or disapproval of trust taxes that are premised on the residence of beneficiaries whose relationship to trust assets differs from that of the beneficiaries here.

A

In the past, the Court has analyzed state trust taxes for consistency with the Due Process Clause by looking to the relationship between the relevant trust constituent (settlor, trustee, or beneficiary) and the trust assets that the State seeks to tax. In the context of beneficiary contacts specifically, the Court has focused on the extent of the in-state beneficiary's right to control, possess, enjoy, or receive trust assets.

The Court's emphasis on these factors emerged in two early cases, *Safe Deposit & Trust Co. of Baltimore* v. *Virginia*, 280 U. S. 83 (1929), and *Brooke* v. *Norfolk*, 277 U. S. 27 (1928), both of which invalidated state taxes premised on the in-state residency of beneficiaries. In each case the challenged tax fell on the entirety of a trust's property, rather than on only the share of trust assets to which the beneficiaries were entitled. *Safe Deposit*, 280 U. S., at 90, 92; *Brooke*, 277 U. S., at 28. In *Safe Deposit*, the Court rejected Virginia's attempt to tax a trustee on the "whole corpus of the trust estate," 280 U. S., at 90; see *id.*, at 93, explaining that "nobody within Virginia ha[d] present right to [the trust property's] control or possession, or to receive income therefrom," *id.*, at 91. In *Brooke*, the Court rejected a tax on the entirety of a trust fund assessed against a resident beneficiary because the trust property "[wa]s not within the State, d[id] not belong to the [beneficiary] and [wa]s not within her possession or control." 277 U. S., at 29.[6]

[6] The State contends that *Safe Deposit* is no longer good law under the more flexible approach in *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), and also because it was premised on the view, later disregarded in *Curry* v. *McCanless*, 307 U. S. 357, 363 (1939), that the Due Process Clause forbids "double taxation." Brief for Petitioner 27–28, and n. 12. We disagree. The aspects of the case noted here are consistent with the pragmatic approach reflected in *International Shoe*, and *Curry* distinguished *Safe Deposit* not because the earlier case incorrectly relied on concerns of double taxation but because the beneficiaries there had "[n]o comparable right or power" to that of the settlor in *Curry*. 307 U. S., at 371, n. 6.

On the other hand, the same elements of possession, control, and enjoyment of trust property led the Court to uphold state taxes based on the in-state residency of beneficiaries who did have close ties to the taxed trust assets. The Court has decided that States may tax trust income that is actually distributed to an in-state beneficiary. In those circumstances, the beneficiary "own[s] and enjoy[s]" an interest in the trust property, and the State can exact a tax in exchange for offering the beneficiary protection. *Maguire*, 253 U. S., at 17; see also *Guaranty Trust Co.* v. *Virginia*, 305 U. S. 19, 21–23 (1938).

All of the foregoing cases reflect a common governing principle: When a State seeks to base its tax on the in-state residence of a trust beneficiary, the Due Process Clause demands a pragmatic inquiry into what exactly the beneficiary controls or possesses and how that interest relates to the object of the State's tax. See *Safe Deposit*, 280 U. S., at 91.

Although the Court's resident-beneficiary cases are most relevant here, similar analysis also appears in the context of taxes premised on the in-state residency of settlors and trustees. In *Curry*, for instance, the Court upheld a Tennessee trust tax because the settlor was a Tennessee resident who retained "power to dispose of" the property, which amounted to "a potential source of wealth which was property in her hands." 307 U. S., at 370. That practical control over the trust assets obliged the settlor "to contribute to the support of the government whose protection she enjoyed." *Id.*, at 371; see also *Graves* v. *Elliott*, 307 U. S. 383, 387 (1939) (a settlor's "right to revoke [a] trust and to demand the transmission to her of the intangibles . . . was a potential source of wealth" subject to tax by her State of residence).[7]

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[7] Though the Court did not have occasion in *Curry* or *Graves* to explore whether a lesser degree of control by a settlor also could sustain a tax by the settlor's domicile (and we do not today address that possibility), these cases nevertheless reinforce the logic employed by *Safe Deposit*, *Brooke* v. *Norfolk*, 277 U. S. 27 (1928), *Maguire* v. *Trefry*, 253 U. S. 12 (1920), and

A focus on ownership and rights to trust assets also featured in the Court's ruling that a trustee's in-state residence can provide the basis for a State to tax trust assets. In *Greenough*, the Court explained that the relationship between trust assets and a trustee is akin to the "close relationship between" other types of intangible property and the owners of such property. 331 U. S., at 493. The trustee is "the owner of [a] legal interest in" the trust property, and in that capacity he can incur obligations, become personally liable for contracts for the trust, or have specific performance ordered against him. *Id.*, at 494. At the same time, the trustee can turn to his home State for "benefit and protection through its law," *id.*, at 496, for instance, by resorting to the State's courts to resolve issues related to trust administration or to enforce trust claims, *id.*, at 495. A State therefore may tax a resident trustee on his interest in a share of trust assets. *Id.*, at 498.

In sum, when assessing a state tax premised on the in-state residency of a constituent of a trust—whether beneficiary, settlor, or trustee—the Due Process Clause demands attention to the particular relationship between the resident and the trust assets that the State seeks to tax. Because each individual fulfills different functions in the creation and continuation of the trust, the specific features of that relationship sufficient to sustain a tax may vary depending on whether the resident is a settlor, beneficiary, or trustee. When a tax is premised on the in-state residence of a beneficiary, the Constitution requires that the resident have some degree of possession, control, or enjoyment of the trust property or a right to receive that property before the State can tax the asset. Cf. *Safe Deposit*, 280 U. S., at 91–92.[8] Other-

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Guaranty Trust Co. v. *Virginia*, 305 U. S. 19 (1938), in the beneficiary context.

[8] As explained below, we hold that the Kaestner Trust beneficiaries do not have the requisite relationship with the Trust property to justify the State's tax. We do not decide what degree of possession, control, or enjoyment would be sufficient to support taxation.

wise, the State's relationship to the object of its tax is too attenuated to create the "minimum connection" that the Constitution requires. See *Quill*, 504 U. S., at 306.

B

Applying these principles here, we conclude that the residence of the Kaestner Trust beneficiaries in North Carolina alone does not supply the minimum connection necessary to sustain the State's tax.

First, the beneficiaries did not receive any income from the trust during the years in question. If they had, such income would have been taxable. See *Maguire*, 253 U. S., at 17; *Guaranty Trust Co.*, 305 U. S., at 23.

Second, the beneficiaries had no right to demand trust income or otherwise control, possess, or enjoy the trust assets in the tax years at issue. The decision of when, whether, and to whom the trustee would distribute the trust's assets was left to the trustee's "absolute discretion." Art. I, § 1.2(a), App. 46–47. In fact, the Trust agreement explicitly authorized the trustee to distribute funds to one beneficiary to "the exclusion of other[s]," with the effect of cutting one or more beneficiaries out of the Trust. Art. I, § 1.4(a), *id.*, at 50. The agreement also authorized the trustee, not the beneficiaries, to make investment decisions regarding Trust property. Art. V, § 5.2, *id.*, at 55–60. The Trust agreement prohibited the beneficiaries from assigning to another person any right they might have to the Trust property, Art. XII, *id.*, at 70–71, thus making the beneficiaries' interest less like "a potential source of wealth [that] was property in [their] hands," *Curry*, 307 U. S., at 370–371.[9]

[9] We do not address whether a beneficiary's ability to assign a potential interest in income from a trust would afford that beneficiary sufficient control or possession over, or enjoyment of, the property to justify taxation based solely on his or her in-state residence.

To be sure, the Kaestner Trust agreement also instructed the trustee to view the trust "as a family asset and to be liberal in the exercise of the discretion conferred," suggesting that the trustee was to make distributions generously with the goal of "meet[ing] the needs of the Beneficiaries" in various respects. Art. I, § 1.4(c), App. 51. And the trustee of a discretionary trust has a fiduciary duty not to "act in bad faith or for some purpose or motive other than to accomplish the purposes of the discretionary power." 2 Restatement (Third) of Trusts § 50, Comment *c*, p. 262 (2001). But by reserving sole discretion to the trustee, the Trust agreement still deprived Kaestner and her children of any entitlement to demand distributions or to direct the use of the Trust assets in their favor in the years in question.

Third, not only were Kaestner and her children unable to demand distributions in the tax years at issue, but they also could not count on necessarily receiving any specific amount of income from the Trust in the future. Although the Trust agreement provided for the Trust to terminate in 2009 (on Kaestner's 40th birthday) and to distribute assets to Kaestner, Art. I, § 1.2(c)(1), App. 47, New York law allowed the trustee to roll over the trust assets into a new trust rather than terminating it, N. Y. Est., Powers & Trusts § 10–6.6(b). Here, the trustee did just that. 371 N. C., at 135, 814 S. E. 2d, at 45.[10]

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[10] In light of these features, one might characterize the interests of the beneficiaries as "contingent" on the exercise of the trustee's discretion. See *Fondren* v. *Commissioner*, 324 U. S. 18, 21 (1945) (describing "the exercise of the trustee's discretion" as an example of a contingency); see also *United States* v. *O'Malley*, 383 U. S. 627, 631 (1966) (describing a grantor's power to add income to the trust principal instead of distributing it and "thereby den[y] to the beneficiaries the privilege of immediate enjoyment and conditio[n] their eventual enjoyment upon surviving the termination of the trust"); *Commissioner* v. *Estate of Holmes*, 326 U. S. 480, 487 (1946) (the termination of a contingency changes "the mere prospect or possibility, even the probability, that one may have [enjoyment of prop-

Like the beneficiaries in *Safe Deposit*, then, Kaestner and her children had no right to "control or posses[s]" the trust assets "or to receive income therefrom." 280 U. S., at 91. The beneficiaries received no income from the Trust, had no right to demand income from the Trust, and had no assurance that they would eventually receive a specific share of Trust income. Given these features of the Trust, the beneficiaries' residence cannot, consistent with due process, serve as the sole basis for North Carolina's tax on trust income.[11]

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erty] at some uncertain future time or perhaps not at all" into a "present substantial benefit"). We have no occasion to address, and thus reserve for another day, whether a different result would follow if the beneficiaries were certain to receive funds in the future. See, *e. g.*, Cal. Rev. & Tax. Code Ann. § 17742(a) (West 2019); *Commonwealth* v. *Stewart*, 338 Pa. 9, 16–19, 12 A. 2d 444, 448–449 (1940) (upholding a tax on the equitable interest of a beneficiary who had "a right to the income from [a] trust for life"), aff'd, 312 U. S. 649 (1941).

[11] Because the reasoning above resolves this case in the Trust's favor, it is unnecessary to reach the Trust's broader argument that the trustee's contacts alone determine the State's power over the Trust. Brief for Respondent 23–30. The Trust relies for this proposition on *Hanson* v. *Denckla*, 357 U. S. 235 (1958), which held that a Florida court lacked jurisdiction to adjudicate the validity of a trust agreement even though the trust settlor and most of the trust beneficiaries were domiciled in Florida. *Id.*, at 254. The problem was that Florida law made the trustee "an indispensable party over whom the court [had to] acquire jurisdiction" before resolving a trust's validity, and the trustee was a nonresident. *Ibid.* In deciding that the Florida courts lacked jurisdiction over the proceeding, the Court rejected the relevance of the trust beneficiaries' residence and focused instead on the "acts of the trustee" himself, which the Court found insufficient to support jurisdiction. *Ibid.*

The State counters that *Hanson* is inapposite because the State's tax applies to the trust rather than to the trustee and because *Hanson* arose in the context of adjudicative jurisdiction rather than tax jurisdiction. Brief for Petitioner 21, n. 9; Reply Brief 16–17.

There is no need to resolve the parties' dueling interpretations of *Hanson*. Even if beneficiary contacts—such as residence—could be sufficient in some circumstances to support North Carolina's power to impose this tax, the residence alone of the Kaestner Trust beneficiaries cannot do so for the reasons given above.

IV

The State's counterarguments do not save its tax.

First, the State interprets *Greenough* as standing for the broad proposition that "a trust and its constituents" are always "inextricably intertwined." Brief for Petitioner 26. Because trustee residence supports state taxation, the State contends, so too must beneficiary residence. The State emphasizes that beneficiaries are essential to a trust and have an "equitable interest" in its assets. *Greenough*, 331 U. S., at 494. In *Stone* v. *White*, 301 U. S. 532 (1937), the State notes, the Court refused to "shut its eyes to the fact" that a suit to recover taxes from a trust was in reality a suit regarding "the beneficiary's money." *Id.*, at 535. The State also argues that its tax is at least as fair as the tax in *Greenough* because the Trust benefits from North Carolina law by way of the beneficiaries, who enjoy secure banks to facilitate asset transfers and also partake of services (such as subsidized public education) that obviate the need to make distributions (for example, to fund beneficiaries' educations). Brief for Petitioner 30–33.

The State's argument fails to grapple with the wide variation in beneficiaries' interests. There is no doubt that a beneficiary is central to the trust relationship, and beneficiaries are commonly understood to hold "beneficial interests (or 'equitable title') in the trust property," 2 Restatement (Third) of Trusts § 42, Comment *a*, at 186. In some cases the relationship between beneficiaries and trust assets is so close as to be beyond separation. In *Stone*, for instance, the beneficiary had already received the trust income on which the government sought to recover tax. See 301 U. S., at 533. But, depending on the trust agreement, a beneficiary may have only a "future interest," an interest that is "subject to conditions," or an interest that is controlled by a trustee's discretionary decisions. 2 Restatement (Third) of Trusts § 49, Comment *b*, at 243. By contrast, in *Greenough*, the requisite connection with the State arose from a legal inter-

est that necessarily carried with it predictable responsibilities and liabilities. See 331 U. S., at 494. The different forms of beneficiary interests counsels against adopting the categorical rule that the State urges.

Second, the State argues that ruling in favor of the Trust will undermine numerous state taxation regimes. Tr. of Oral Arg. 8, 68; Brief for Petitioner 6, and n. 1. Today's ruling will have no such sweeping effect. North Carolina is one of a small handful of States that rely on beneficiary residency as a sole basis for trust taxation, and one of an even smaller number that will rely on the residency of beneficiaries regardless of whether the beneficiary is certain to receive trust assets.[12] Today's decision does not address state laws that consider the in-state residency of a beneficiary as one of a combination of factors, that turn on the residency of a settlor, or that rely only on the residency of noncontingent beneficiaries, see, *e. g.*, Cal. Rev. & Tax. Code Ann. § 17742(a).[13] We express no opinion on the validity of such taxes.

[12] The State directs the Court's attention to 10 other state trust taxation statutes that also look to trust beneficiaries' in-state residency, see Brief for Petitioner 6, and n. 1, but 5 are unlike North Carolina's because they consider beneficiary residence only in combination with other factors, see Ala. Code § 40–18–1(33) (2011); Conn. Gen. Stat. § 12–701(a)(4) (2019 Cum. Supp.); Mo. Rev. Stat. §§ 143.331(2), (3) (2016); Ohio Rev. Code Ann. § 5747.01(I)(3) (Lexis Supp. 2019); R. I. Gen. Laws § 44–30–5(c) (2010). Of the remaining five statutes, it is not clear that the flexible tests employed in Montana and North Dakota permit reliance on beneficiary residence alone. See Mont. Admin. Rule 42.30.101(16) (2016); N. D. Admin. Code § 81–03–02.1–04(2) (2018). Similarly, Georgia's imposition of a tax on the sole basis of beneficiary residency is disputed. See Ga. Code Ann. § 48–7–22(a)(1)(C) (2017); Brief for Respondent 52, n. 20. Tennessee will be phasing out its income tax entirely by 2021. H. B. 534, 110th Gen. Assem., Reg. Sess. (2017) (enacted); see Tenn. Code Ann. § 67–2–110(a) (2013). That leaves California, which (unlike North Carolina) applies its tax on the basis of beneficiary residency only where the beneficiary is not contingent. Cal. Rev. & Tax. Code Ann. § 17742(a); see also n. 10, *supra.*

[13] The Trust also raises no challenge to the practice known as throwback taxation, by which a State taxes accumulated income at the time it is actually distributed. See, *e. g.*, Cal. Rev. & Tax. Code Ann. § 17745(b).

Finally, North Carolina urges that adopting the Trust's position will lead to opportunistic gaming of state tax systems, noting that trust income nationally exceeded $120 billion in 2014. See Brief for Petitioner 39, and n. 13. The State is concerned that a beneficiary in Kaestner's position will delay taking distributions until she moves to a State with a lower level of taxation, thereby paying less tax on the funds she ultimately receives. See *id.*, at 40.

Though this possibility is understandably troubling to the State, it is by no means certain that it will regularly come to pass. First, the power to make distributions to Kaestner or her children resides with the trustee. When and whether to make distributions is not for Kaestner to decide, and in fact the trustee may distribute funds to Kaestner while she resides in North Carolina (or deny her distributions entirely). Second, we address only the circumstances in which a beneficiary receives no trust income, has no right to demand that income, and is uncertain necessarily to receive a specific share of that income. Settlors who create trusts in the future will have to weigh the potential tax benefits of such an arrangement against the costs to the trust beneficiaries of lesser control over trust assets. In any event, mere speculation about negative consequences cannot conjure the "minimum connection" missing between North Carolina and the object of its tax.

* * *

For the foregoing reasons, we affirm the judgment of the Supreme Court of North Carolina.

It is so ordered.

JUSTICE ALITO, with whom THE CHIEF JUSTICE and JUSTICE GORSUCH join, concurring.

I join the opinion of the Court because it properly concludes that North Carolina's tenuous connection to the income earned by the trust is insufficient to permit the State to tax the trust's income. Because this connection is unusually tenuous, the opinion of the Court is circumscribed. I write

separately to make clear that the opinion of the Court merely applies our existing precedent and that its decision not to answer questions not presented by the facts of this case does not open for reconsideration any points resolved by our prior decisions.

* * *

Kimberley Rice Kaestner is the beneficiary of a trust established by her father. She is also a resident of North Carolina. Between 2005 and 2008, North Carolina required the trustee, who is a resident of Connecticut, to pay more than $1.3 million in taxes on income earned by the assets in the trust. North Carolina levied this tax because of Kaestner's residence within the State.

States have broad discretion to structure their tax systems. But, in a few narrow areas, the Federal Constitution imposes limits on that power. See, *e. g.*, *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819); *Comptroller of Treasury of Md.* v. *Wynne*, 575 U. S. 542 (2015). The Due Process Clause creates one such limit. It imposes restrictions on the persons and property that a State can subject to its taxation authority. "The Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 306 (1992) (quoting *Miller Brothers Co.* v. *Maryland*, 347 U. S. 340, 344–345 (1954)), overruled in part on other grounds by *South Dakota* v. *Wayfair, Inc.*, 585 U. S. 162 (2018). North Carolina assesses this tax against the trustee and calculates the tax based on the income earned by the trust. N. C. Gen. Stat. Ann. § 105–160.2 (2017). Therefore we must look at the connections between the assets held in trust and the State.

It is easy to identify a State's connection with tangible assets. A tangible asset has a connection with the State in which it is located, and generally speaking, only that State has power to tax the asset. *Curry* v. *McCanless*, 307 U. S. 357, 364–365 (1939). Intangible assets—stocks, bonds, or

other securities, for example—present a more difficult question.

In the case of intangible assets held in trust, we have previously asked whether a resident of the State imposing the tax has control, possession, or the enjoyment of the asset. See *Greenough* v. *Tax Assessors of Newport*, 331 U. S. 486, 493–495 (1947); *Curry*, *supra*, at 370–371; *Safe Deposit & Trust Co. of Baltimore* v. *Virginia*, 280 U. S. 83, 93–94 (1929); *Brooke* v. *Norfolk*, 277 U. S. 27, 28–29 (1928). Because a trustee is the legal owner of the trust assets and possesses the powers that accompany that status—power to manage the investments, to make and enforce contracts respecting the assets, to litigate on behalf of the trust, etc.—the trustee's State of residence can tax the trust's intangible assets. *Greenough*, *supra*, at 494, 498. Here, we are asked whether the connection between a beneficiary and a trust is sufficient to allow the beneficiary's State of residence to tax the trust assets and the income they earn while the assets and income remain in the trust in another State. Two cases provide a clear answer.

In *Brooke*, Virginia assessed a tax on the assets of a trust whose beneficiary was a resident of Virginia. The trustee was not a resident of Virginia and administered the trust outside the Commonwealth. Under the terms of the trust, the beneficiary was entitled to all the income of the trust and had paid income taxes for the money that had been transferred to her. But the Court held that, despite the beneficiary's present and ongoing right to receive income from the trust, Virginia could not impose taxes on the undistributed assets that remained within the trust because "the property is not within the State, does not belong to the petitioner and is not within her possession or control." 277 U. S., at 29. Even though the beneficiary was entitled to and received income from the trust, we observed that "she [wa]s a stranger" to the assets within the trust because she lacked control, possession, or enjoyment of them. *Ibid.*

In *Safe Deposit*, Virginia again attempted to assess taxes on the intangible assets held in a trust whose trustee resided in Maryland. The beneficiaries were children who lived in Virginia. Under the terms of the trust, each child was entitled to one half of the trust's assets (both the original principal and the income earned over time) when the child reached the age of 25. Despite their entitlement to the entire corpus of the trust, the Court held that the beneficiaries' residence did not allow Virginia to tax the assets while they remained in trust. "[N]obody within Virginia has present right to [the assets'] control or possession, or to receive income therefrom, or to cause them to be brought physically within her borders." 280 U. S., at 91.* The beneficiaries' equitable ownership of the trust did not sufficiently connect the undistributed assets to Virginia as to allow taxation of the trust. The beneficiaries' equitable ownership yielded to the "established fact of legal ownership, actual presence and control elsewhere." *Id.*, at 92.

Here, as in *Brooke* and *Safe Deposit*, the resident beneficiary has neither control nor possession of the intangible assets in the trust. She does not enjoy the use of the trust assets. The trustee administers the trust and holds the trust assets outside the State of North Carolina. Under *Safe Deposit* and *Brooke*, that is sufficient to establish that North Carolina cannot tax the trust or the trustee on the intangible assets held by the trust.

* * *

The Due Process Clause requires a sufficient connection between an asset and a State before the State can tax the asset. For intangible assets held in trust, our precedents dictate that a resident beneficiary's control, possession, and

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*Although the Court noted that no Virginian had a present right "to receive income therefrom," *Brooke*—where the beneficiary was entitled to and received income from the trust—suggests that even if the children had such a right, it would not, alone, justify taxing the trust corpus.

ability to use or enjoy the asset are the core of the inquiry. The opinion of the Court rightly concludes that the assets in this trust and the trust's undistributed income cannot be taxed by North Carolina because the resident beneficiary lacks control, possession, or enjoyment of the trust assets. The Court's discussion of the peculiarities of this trust does not change the governing standard, nor does it alter the reasoning applied in our earlier cases. On that basis, I concur.

Syllabus

FLOWERS *v.* MISSISSIPPI

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 17–9572. Argued March 20, 2019—Decided June 21, 2019

Petitioner Curtis Flowers has been tried six separate times for the murder of four employees of a Mississippi furniture store. Flowers is black; three of the four victims were white. At the first two trials, the State used its peremptory strikes on all of the qualified black prospective jurors. In each case, the jury convicted Flowers and sentenced him to death, but the convictions were later reversed by the Mississippi Supreme Court based on prosecutorial misconduct. At the third trial, the State used all of its 15 peremptory strikes against black prospective jurors, and the jury convicted Flowers and sentenced him to death. The Mississippi Supreme Court reversed again, this time concluding that the State exercised its peremptory strikes on the basis of race in violation of *Batson* v. *Kentucky*, 476 U. S. 79. Flowers' fourth and fifth trials ended in mistrials. At the fourth, the State exercised 11 peremptory strikes—all against black prospective jurors. No available racial information exists about the prospective jurors in the fifth trial. At the sixth trial, the State exercised six peremptory strikes—five against black prospective jurors, allowing one black juror to be seated. Flowers again raised a *Batson* claim, but the trial court concluded that the State had offered race-neutral reasons for each of the five peremptory strikes. The jury convicted Flowers and sentenced him to death. The Mississippi Supreme Court affirmed. After this Court vacated that judgment and remanded in light of *Foster* v. *Chatman*, 578 U. S. 488, the Mississippi Supreme Court again upheld Flowers' conviction in a divided 5-to-4 decision. Justice King dissented on the *Batson* issue and was joined by two other Justices.

Held: All of the relevant facts and circumstances taken together establish that the trial court at Flowers' sixth trial committed clear error in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was not motivated in substantial part by discriminatory intent. Pp. 293–316.

(a) Under *Batson*, once a prima facie case of discrimination has been shown by a defendant, the State must provide race-neutral reasons for its peremptory strikes. The trial judge then must determine whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination. The *Batson* Court rejected four arguments. First, the *Batson* Court rejected the idea that a defendant must demonstrate a history of racially discriminatory strikes in order

to make out a claim of race discrimination. Second, the *Batson* Court rejected the argument that a prosecutor could strike a black juror based on an assumption or belief that the black juror would favor a black defendant. Third, the *Batson* Court rejected the argument that race-based peremptories should be permissible because black, white, Asian, and Hispanic defendants and jurors were all "equally" subject to race-based discrimination. Fourth, the *Batson* Court rejected the argument that race-based peremptories are permissible because both the prosecution and defense could employ them in any individual case and in essence balance things out. Pp. 293–300.

(b) Four categories of evidence loom large in assessing the *Batson* issue here, where the State had a persistent pattern of striking black prospective jurors from Flowers' first through his sixth trial. Pp. 301–315.

(1) A review of the history of the State's peremptory strikes in Flowers' first four trials strongly supports the conclusion that the State's use of peremptory strikes in Flowers' sixth trial was motivated in substantial part by discriminatory intent. The State tried to strike all 36 black prospective jurors over the course of the first four trials. And the state courts themselves concluded that the State had violated *Batson* on two separate occasions. The State's relentless, determined effort to rid the jury of black individuals strongly suggests that the State wanted to try Flowers before a jury with as few black jurors as possible, and ideally before an all-white jury. Pp. 304–307.

(2) The State's use of peremptory strikes in Flowers' sixth trial followed the same pattern as the first four trials. P. 307.

(3) Disparate questioning can be probative of discriminatory intent. *Miller-El* v. *Cockrell*, 537 U. S. 322, 331–332, 344–345. Here, the State spent far more time questioning the black prospective jurors than the accepted white jurors—145 questions asked of 5 black prospective jurors and 12 questions asked of 11 white seated jurors. The record refutes the State's explanation that it questioned black and white prospective jurors differently only because of differences in the jurors' characteristics. Along with the historical evidence from the earlier trials, as well as the State's striking of five of six black prospective jurors at the sixth trial, the dramatically disparate questioning and investigation of black prospective jurors and white prospective jurors at the sixth trial strongly suggest that the State was motivated in substantial part by a discriminatory intent. Pp. 307–311.

(4) Comparing prospective jurors who were struck and not struck can be an important step in determining whether a *Batson* violation occurred. See *Snyder* v. *Louisiana*, 552 U. S. 472, 483–484. Here, Carolyn Wright, a black prospective juror, was struck, the State says, in part because she knew several defense witnesses and had worked at

Wal-Mart where Flowers' father also worked. But three white prospective jurors also knew many individuals involved in the case, and the State asked them no individual questions about their connections to witnesses. White prospective jurors also had relationships with members of Flowers' family, but the State did not ask them follow-up questions in order to explore the depth of those relationships. The State also incorrectly explained that it exercised a peremptory strike against Wright because she had worked with one of Flowers' sisters and made apparently incorrect statements to justify the strikes of other black prospective jurors. When considered with other evidence, a series of factually inaccurate explanations for striking black prospective jurors can be another clue showing discriminatory intent. The overall context here requires skepticism of the State's strike of Carolyn Wright. The trial court at Flowers' sixth trial committed clear error in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was not motivated in substantial part by discriminatory intent. Pp. 311–315.

240 So. 3d 1082, reversed and remanded.

KAVANAUGH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a concurring opinion, *post*, p. 316. THOMAS, J., filed a dissenting opinion, in which GORSUCH, J., joined as to Parts I, II, and III, *post*, p. 317.

Sheri Lynn Johnson argued the cause petitioner. With her on the briefs were *Keir M. Weyble* and *Alison Steiner*.

Jason Davis, Special Assistant Attorney General of Mississippi, argued the cause for respondent. With him on the briefs were *Jim Hood*, Attorney General, and *Brad Smith*, Special Assistant Attorney General.*

JUSTICE KAVANAUGH delivered the opinion of the Court.

In *Batson* v. *Kentucky*, 476 U. S. 79 (1986), this Court ruled that a State may not discriminate on the basis of race

*Briefs of *amici curiae* urging reversal were filed for Former Justice Department Officials by *Donald B. Verrilli, Jr.*, *Ginger D. Anders*, and *Christopher M. Lynch*; and for the NAACP Legal Defense & Educational Fund, Inc., by *Christopher Kemmitt*, *Sherrilyn A. Ifill*, *Janai S. Nelson*, and *Samuel Spital*.

when exercising peremptory challenges against prospective jurors in a criminal trial.

In 1996, Curtis Flowers allegedly murdered four people in Winona, Mississippi. Flowers is black. He has been tried six separate times before a jury for murder. The same lead prosecutor represented the State in all six trials.

In the initial three trials, Flowers was convicted, but the Mississippi Supreme Court reversed each conviction. In the first trial, Flowers was convicted, but the Mississippi Supreme Court reversed the conviction due to "numerous instances of prosecutorial misconduct." *Flowers* v. *State*, 773 So. 2d 309, 327 (2000). In the second trial, the trial court found that the prosecutor discriminated on the basis of race in the peremptory challenge of a black juror. The trial court seated the black juror. Flowers was then convicted, but the Mississippi Supreme Court again reversed the conviction because of prosecutorial misconduct at trial. In the third trial, Flowers was convicted, but the Mississippi Supreme Court yet again reversed the conviction, this time because the court concluded that the prosecutor had again discriminated against black prospective jurors in the jury selection process. The court's lead opinion stated: "The instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge." *Flowers* v. *State*, 947 So. 2d 910, 935 (2007). The opinion further stated that the "State engaged in racially discriminatory practices during the jury selection process" and that the "case evinces an effort by the State to exclude African-Americans from jury service." *Id.*, at 937, 939.

The fourth and fifth trials of Flowers ended in mistrials due to hung juries.

In his sixth trial, which is the one at issue here, Flowers was convicted. The State struck five of the six black prospective jurors. On appeal, Flowers argued that the State again violated *Batson* in exercising peremptory strikes against black prospective jurors. In a divided 5-to-4 deci-

sion, the Mississippi Supreme Court affirmed the conviction. We granted certiorari on the *Batson* question and now reverse. See 586 U. S. 985 (2018).

Four critical facts, taken together, require reversal. *First*, in the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck—a statistic that the State acknowledged at oral argument in this Court. Tr. of Oral Arg. 32. *Second*, in the most recent trial, the sixth trial, the State exercised peremptory strikes against five of the six black prospective jurors. *Third*, at the sixth trial, in an apparent effort to find pretextual reasons to strike black prospective jurors, the State engaged in dramatically disparate questioning of black and white prospective jurors. *Fourth*, the State then struck at least one black prospective juror, Carolyn Wright, who was similarly situated to white prospective jurors who were not struck by the State.

We need not and do not decide that any one of those four facts alone would require reversal. All that we need to decide, and all that we do decide, is that all of the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was not "motivated in substantial part by discriminatory intent." *Foster* v. *Chatman*, 578 U. S. 488, 513 (2016) (internal quotation marks omitted). In reaching that conclusion, we break no new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case.

We reverse the judgment of the Supreme Court of Mississippi, and we remand the case for further proceedings not inconsistent with this opinion.

I

The underlying events that gave rise to this case took place in Winona, Mississippi. Winona is a small town in

northern Mississippi, just off I–55 almost halfway between Jackson and Memphis. The total population of Winona is about 5,000. The town is about 53 percent black and about 46 percent white.

In 1996, Bertha Tardy, Robert Golden, Derrick Stewart, and Carmen Rigby were murdered at the Tardy Furniture store in Winona. All four victims worked at the Tardy Furniture store. Three of the four victims were white; one was black. In 1997, the State charged Curtis Flowers with murder. Flowers is black. Since then, Flowers has been tried six separate times for the murders. In each of the first two trials, Flowers was tried for one individual murder. In each subsequent trial, Flowers was tried for all four of the murders together. The same state prosecutor tried Flowers each time. The prosecutor is white.

At Flowers' first trial, 36 prospective jurors—5 black and 31 white—were presented to potentially serve on the jury. The State exercised a total of 12 peremptory strikes, and it used 5 of them to strike the five qualified black prospective jurors. Flowers objected, arguing under *Batson* that the State had exercised its peremptory strikes in a racially discriminatory manner. The trial court rejected the *Batson* challenge. Because the trial court allowed the State's peremptory strikes, Flowers was tried in front of an all-white jury. The jury convicted Flowers and sentenced him to death.

On appeal, the Mississippi Supreme Court reversed the conviction, concluding that the State had committed prosecutorial misconduct in front of the jury by, among other things, expressing baseless grounds for doubting the credibility of witnesses and mentioning facts that had not been allowed into evidence by the trial judge. *Flowers*, 773 So. 2d, at 317, 334. In its opinion, the Mississippi Supreme Court described "numerous instances of prosecutorial misconduct" at the trial. *Id.*, at 327. Because the Mississippi Supreme Court reversed based on prosecutorial misconduct at trial,

the court did not reach Flowers' *Batson* argument. See *Flowers*, 773 So. 2d, at 327.

At the second trial, 30 prospective jurors—5 black and 25 white—were presented to potentially serve on the jury. As in Flowers' first trial, the State again used its strikes against all five black prospective jurors. But this time, the trial court determined that the State's asserted reason for one of the strikes was a pretext for discrimination. Specifically, the trial court determined that one of the State's proffered reasons—that the juror had been inattentive and was nodding off during jury selection—for striking that juror was false, and the trial court therefore sustained Flowers' *Batson* challenge. The trial court disallowed the strike and sat that black juror on the jury. The jury at Flowers' second trial consisted of 11 white jurors and 1 black juror. The jury convicted Flowers and sentenced him to death.

On appeal, the Mississippi Supreme Court again reversed. The court ruled that the prosecutor had again engaged in prosecutorial misconduct in front of the jury by, among other things, impermissibly referencing evidence and attempting to undermine witness credibility without a factual basis. See *Flowers* v. *State*, 842 So. 2d 531, 538, 553 (2003).

At Flowers' third trial, 45 prospective jurors—17 black and 28 white—were presented to potentially serve on the jury. One of the black prospective jurors was struck for cause, leaving 16. The State exercised a total of 15 peremptory strikes, and it used all 15 against black prospective jurors. Flowers again argued that the State had used its peremptory strikes in a racially discriminatory manner. The trial court found that the State had not discriminated on the basis of race. See *Flowers*, 947 So. 2d, at 916. The jury in Flowers' third trial consisted of 11 white jurors and 1 black juror. The lone black juror who served on the jury was seated after the State ran out of peremptory strikes. The jury convicted Flowers and sentenced him to death.

On appeal, the Mississippi Supreme Court yet again reversed, concluding that the State had again violated *Batson* by discriminating on the basis of race in exercising all 15 of its peremptory strikes against 15 black prospective jurors. See *Flowers*, 947 So. 2d, at 939. The court's lead opinion stated: "The instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge." *Id.*, at 935. The opinion explained that although "each individual strike may have justifiably appeared to the trial court to be sufficiently race neutral, the trial court also has a duty to look at the State's use of peremptory challenges *in toto*." *Id.*, at 937. The opinion emphasized that "trial judges should not blindly accept any and every reason put forth by the State, especially" when "the State continues to exercise challenge after challenge only upon members of a particular race." *Ibid.* The opinion added that the "State engaged in racially discriminatory practices" and that the "case evinces an effort by the State to exclude African-Americans from jury service." *Id.*, at 937, 939.

At Flowers' fourth trial, 36 prospective jurors—16 black and 20 white—were presented to potentially serve on the jury. The State exercised a total of 11 peremptory strikes, and it used all 11 against black prospective jurors. But because of the relatively large number of prospective jurors who were black, the State did not have enough peremptory challenges to eliminate all of the black prospective jurors. The seated jury consisted of seven white jurors and five black jurors. That jury could not reach a verdict, and the proceeding ended in a mistrial.

As to the fifth trial, there is no available racial information about the prospective jurors, as distinct from the jurors who ultimately sat on the jury. The jury was composed of nine white jurors and three black jurors. The jury could not reach a verdict, and the trial again ended in a mistrial.

At the sixth trial, which we consider here, 26 prospective jurors—6 black and 20 white—were presented to potentially serve on the jury. The State exercised a total of six peremptory strikes, and it used five of the six against black prospective jurors, leaving one black juror to sit on the jury. Flowers again argued that the State had exercised its peremptory strikes in a racially discriminatory manner. The trial court concluded that the State had offered race-neutral reasons for each of the five peremptory strikes against the five black prospective jurors. The jury at Flowers' sixth trial consisted of 11 white jurors and 1 black juror. That jury convicted Flowers of murder and sentenced him to death.

In a divided decision, the Mississippi Supreme Court agreed with the trial court on the *Batson* issue and stated that the State's "race-neutral reasons were valid and not merely pretextual." *Flowers* v. *State*, 158 So. 3d 1009, 1058 (2014). Flowers then sought review in this Court. This Court granted Flowers' petition for a writ of certiorari, vacated the judgment of the Mississippi Supreme Court, and remanded for further consideration in light of the decision in *Foster*, 578 U. S. 488. *Flowers* v. *Mississippi*, 579 U. S. 913 (2016). In *Foster*, this Court held that the defendant Foster had established a *Batson* violation. 578 U. S., at 514.

On remand, the Mississippi Supreme Court by a 5-to-4 vote again upheld Flowers' conviction. See 240 So. 3d 1082 (2017). Justice King wrote a dissent for three justices. He stated: "I cannot conclude that Flowers received a fair trial, nor can I conclude that prospective jurors were not subjected to impermissible discrimination." *Id.*, at 1172. According to Justice King, both the trial court and the Mississippi Supreme Court "completely disregard[ed] the constitutional right of prospective jurors to be free from a racially discriminatory selection process." *Id.*, at 1171. We granted certiorari. See 586 U. S. 985.

II

A

Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process. See *Powers* v. *Ohio*, 499 U. S. 400, 407 (1991).

Jury selection in criminal cases varies significantly based on state and local rules and practices, but ordinarily consists of three phases, which we describe here in general terms. *First*, a group of citizens in the community is randomly summoned to the courthouse on a particular day for potential jury service. *Second*, a subgroup of those prospective jurors is called into a particular courtroom for a specific case. The prospective jurors are often questioned by the judge, as well as by the prosecutor and defense attorney. During that second phase, the judge may excuse certain prospective jurors based on their answers. *Third*, the prosecutor and defense attorney may challenge certain prospective jurors. The attorneys may challenge prospective jurors for cause, which usually stems from a potential juror's conflicts of interest or inability to be impartial. In addition to challenges for cause, each side is typically afforded a set number of peremptory challenges or strikes. Peremptory strikes have very old credentials and can be traced back to the common law. Those peremptory strikes traditionally may be used to remove any potential juror for any reason—no questions asked.

That blanket discretion to peremptorily strike prospective jurors for any reason can clash with the dictates of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. This case arises at the intersection of the peremptory challenge and the Equal Protection Clause. And to understand how equal protection law applies to peremptory challenges, it helps to begin at the beginning.

Ratified in 1868 in the wake of the Civil War, the Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." A primary objective of the Equal Protection Clause, this Court stated just five years after ratification, was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Slaughter-House Cases*, 16 Wall. 36, 71 (1873).

In 1875, to help enforce the Fourteenth Amendment, Congress passed and President Ulysses S. Grant signed the Civil Rights Act of 1875. Ch. 114, 18 Stat. 335. Among other things, that law made it a criminal offense for state officials to exclude individuals from jury service on account of their race. 18 U. S. C. § 243. The Act provides: "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude."

In 1880, just 12 years after ratification of the Fourteenth Amendment, the Court decided *Strauder* v. *West Virginia*, 100 U. S. 303. That case concerned a West Virginia statute that allowed whites only to serve as jurors. The Court held the law unconstitutional.

In reaching its conclusion, the Court explained that the Fourteenth Amendment required "that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color." *Id.*, at 307. In the words of the *Strauder* Court: "The very fact that colored people are singled out and expressly denied by a statute all right to partic-

ipate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Id.*, at 308. For those reasons, the Court ruled that the West Virginia statute excluding blacks from jury service violated the Fourteenth Amendment.

As the Court later explained in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), the Court's decisions in the *Slaughter-House Cases* and *Strauder* interpreted the Fourteenth Amendment "as proscribing all state-imposed discriminations against the Negro race," including in jury service. *Brown*, 347 U. S., at 490.

In the decades after *Strauder*, the Court reiterated that States may not discriminate on the basis of race in jury selection. See, *e. g.*, *Neal* v. *Delaware*, 103 U. S. 370, 397 (1881); *Carter* v. *Texas*, 177 U. S. 442, 447 (1900); *Norris* v. *Alabama*, 294 U. S. 587, 597–599 (1935); *Hale* v. *Kentucky*, 303 U. S. 613, 616 (1938) (*per curiam*); *Pierre* v. *Louisiana*, 306 U. S. 354, 362 (1939); *Smith* v. *Texas*, 311 U. S. 128, 130–131 (1940); *Avery* v. *Georgia*, 345 U. S. 559, 562 (1953); *Hernandez* v. *Texas*, 347 U. S. 475, 477–478, 482 (1954); *Coleman* v. *Alabama*, 377 U. S. 129, 133 (1964).

But critical problems persisted. Even though laws barring blacks from serving on juries were unconstitutional after *Strauder*, many jurisdictions employed various discriminatory tools to prevent black persons from being called for jury service. And when those tactics failed, or were invalidated, prosecutors could still exercise peremptory strikes in individual cases to remove most or all black prospective jurors.

In the century after *Strauder*, the freedom to exercise peremptory strikes for any reason meant that "the problem of

racial exclusion from jury service" remained "widespread" and "deeply entrenched." 5 U. S. Commission on Civil Rights Report 90 (1961). Simple math shows how that happened. Given that blacks were a minority of the population, in many jurisdictions the number of peremptory strikes available to the prosecutor exceeded the number of black prospective jurors. So prosecutors could routinely exercise peremptories to strike all the black prospective jurors and thereby ensure all-white juries. The exclusion of black prospective jurors was almost total in certain jurisdictions, especially in cases involving black defendants. Similarly, defense counsel could use—and routinely did use—peremptory challenges to strike all the black prospective jurors in cases involving white defendants and black victims.

In the aftermath of *Strauder*, the exclusion of black jurors became more covert and less overt—often accomplished through peremptory challenges in individual courtrooms rather than by blanket operation of law. But as this Court later noted, the results were the same for black jurors and black defendants, as well as for the black community's confidence in the fairness of the American criminal justice system. See *Batson*, 476 U. S., at 98–99.

Eighty-five years after *Strauder*, the Court decided *Swain* v. *Alabama*, 380 U. S. 202 (1965). The defendant Swain was black. Swain was convicted of a capital offense in Talladega County, Alabama, and sentenced to death. Swain presented evidence that no black juror had served on a jury in Talladega County in more than a decade. See *id.*, at 226. And in Swain's case, the prosecutor struck all six qualified black prospective jurors, ensuring that Swain was tried before an all-white jury. Swain invoked *Strauder* to argue that the prosecutor in his case had impermissibly discriminated on the basis of race by using peremptory challenges to strike the six black prospective jurors. See 380 U. S., at 203, 210.

This Court ruled that Swain had not established unconstitutional discrimination. Most importantly, the Court held

that a defendant could not object to the State's use of peremptory strikes in an individual case. In the Court's words: "[W]e cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws." *Id.*, at 221. The *Swain* Court reasoned that prosecutors do not always judge prospective jurors individually when exercising peremptory strikes. Instead, prosecutors choose which prospective jurors to strike "in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried." *Ibid.* In the Court's view, the prosecutor could strike prospective jurors on the basis of their group affiliations, including race. In other words, a prosecutor could permissibly strike a prospective juror for any reason, including the assumption or belief that a black prospective juror, because of race, would be favorable to a black defendant or unfavorable to the State. See *id.*, at 220–221.

To be sure, the *Swain* Court held that a defendant could make out a case of racial discrimination by showing that the State "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be," had been responsible for the removal of qualified black prospective jurors so that no black jurors "ever serve on petit juries." *Id.*, at 223. But *Swain*'s high bar for establishing a constitutional violation was almost impossible for any defendant to surmount, as the aftermath of *Swain* amply demonstrated.

Twenty-one years later, in its 1986 decision in *Batson*, the Court revisited several critical aspects of *Swain* and in essence overruled them. In so doing, the *Batson* Court emphasized that "the central concern" of the Fourteenth Amendment "was to put an end to governmental discrimination on account of race." 476 U. S., at 85. The *Batson* Court noted that *Swain* had left prosecutors' peremptory challenges "largely immune from constitutional scrutiny." 476 U. S., at 92–93. In his concurrence in *Batson*, Justice

Byron White (the author of *Swain*) agreed that *Swain* should be overruled. He stated: "[T]he practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread, so much so" that "I agree with the Court that the time has come to rule as it has." 476 U. S., at 101–102.

Under *Batson*, once a prima facie case of discrimination has been shown by a defendant, the State must provide race-neutral reasons for its peremptory strikes. The trial judge must determine whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination. *Id.*, at 97–98.

Four parts of *Batson* warrant particular emphasis here.

First, the *Batson* Court rejected *Swain*'s insistence that a defendant demonstrate a history of racially discriminatory strikes in order to make out a claim of race discrimination. See 476 U. S., at 95. According to the *Batson* Court, defendants had run into "practical difficulties" in trying to prove that a State had systematically "exercised peremptory challenges to exclude blacks from the jury on account of race." *Id.*, at 92, n. 17. The *Batson* Court explained that, in some jurisdictions, requiring a defendant to "investigate, over a number of cases, the race of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges" posed an "insurmountable" burden. *Ibid.*

In addition to that practical point, the Court stressed a basic equal protection point: In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many.

For those reasons, the *Batson* Court held that a criminal defendant could show "purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges *at the defendant's trial*." *Id.*, at 96 (emphasis added).

Second, the *Batson* Court rejected *Swain*'s statement that a prosecutor could strike a black juror based on an assumption or belief that the black juror would favor a black defendant. In some of the most critical sentences in the *Batson* opinion, the Court emphasized that a prosecutor may not rebut a claim of discrimination "by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race." 476 U. S., at 97. The Court elaborated: The Equal Protection Clause "forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race." *Id.*, at 97–98. In his concurrence, Justice Thurgood Marshall drove the point home: "Exclusion of blacks from a jury, solely because of race, can no more be justified by a belief that blacks are less likely than whites to consider fairly or sympathetically the State's case against a black defendant than it can be justified by the notion that blacks lack the intelligence, experience, or moral integrity to be entrusted with that role." *Id.*, at 104–105 (internal quotation marks and citations omitted).

Third, the *Batson* Court did not accept the argument that race-based peremptories should be permissible because black, white, Asian, and Hispanic defendants and jurors were all "equally" subject to race-based discrimination. The Court stated that each removal of an individual juror because of his or her race is a constitutional violation. Discrimination against one defendant or juror on account of race is not remedied or cured by discrimination against other defendants or jurors on account of race. As the Court later explained: Some say that there is no equal protection viola-

tion if individuals "of all races are subject to like treatment, which is to say that white jurors are subject to the same risk of peremptory challenges based on race as are all other jurors. The suggestion that racial classifications may survive when visited upon all persons is no more authoritative today than the case which advanced the theorem, *Plessy* v. *Ferguson*, 163 U. S. 537 (1896). This idea has no place in our modern equal protection jurisprudence. It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree." *Powers*, 499 U. S., at 410 (citing *Loving* v. *Virginia*, 388 U. S. 1 (1967)).

Fourth, the *Batson* Court did not accept the argument that race-based peremptories are permissible because both the prosecution and defense could employ them in any individual case and in essence balance things out. Under the Equal Protection Clause, the Court stressed, even a single instance of race discrimination against a prospective juror is impermissible. Moreover, in criminal cases involving black defendants, the both-sides-can-do-it argument overlooks the percentage of the United States population that is black (about 12 percent) and the cold reality of jury selection in most jurisdictions. Because blacks are a minority in most jurisdictions, prosecutors often have more peremptory strikes than there are black prospective jurors on a particular panel. In the pre-*Batson* era, therefore, allowing each side in a case involving a black defendant to strike prospective jurors on the basis of race meant that a prosecutor could eliminate all of the black jurors, but a black defendant could not eliminate all of the white jurors. So in the real world of criminal trials against black defendants, both history and math tell us that a system of race-based peremptories does not treat black defendants and black prospective jurors equally with prosecutors and white prospective jurors. Cf. *Batson*, 476 U. S., at 99.

B

Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process. Enforcing that constitutional principle, *Batson* ended the widespread practice in which prosecutors could (and often would) routinely strike all black prospective jurors in cases involving black defendants. By taking steps to eradicate racial discrimination from the jury selection process, *Batson* sought to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system. *Batson* immediately revolutionized the jury selection process that takes place every day in federal and state criminal courtrooms throughout the United States.

In the decades since *Batson*, this Court's cases have vigorously enforced and reinforced the decision, and guarded against any backsliding. See *Foster*, 578 U. S. 488; *Snyder* v. *Louisiana*, 552 U. S. 472 (2008); *Miller-El* v. *Dretke*, 545 U. S. 231 (2005) (*Miller-El II*). Moreover, the Court has extended *Batson* in certain ways. A defendant of any race may raise a *Batson* claim, and a defendant may raise a *Batson* claim even if the defendant and the excluded juror are of different races. See *Hernandez*, 347 U. S., at 477–478; *Powers*, 499 U. S., at 406. Moreover, *Batson* now applies to gender discrimination, to a criminal defendant's peremptory strikes, and to civil cases. See *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 129 (1994); *Georgia* v. *McCollum*, 505 U. S. 42, 59 (1992); *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 616 (1991).

Of particular relevance here, *Batson*'s holding raised several important evidentiary and procedural issues, three of which we underscore.

First, what factors does the trial judge consider in evaluating whether racial discrimination occurred? Our precedents allow criminal defendants raising *Batson* challenges to present a variety of evidence to support a claim that a prosecu-

tor's peremptory strikes were made on the basis of race. For example, defendants may present:

- statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
- evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;
- side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
- a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
- relevant history of the State's peremptory strikes in past cases; or
- other relevant circumstances that bear upon the issue of racial discrimination.

See *Foster*, 578 U. S. 488; *Snyder*, 552 U. S. 472; *Miller-El II*, 545 U. S. 231; *Batson*, 476 U. S. 79.

Second, who enforces *Batson*? As the *Batson* Court itself recognized, the job of enforcing *Batson* rests first and foremost with trial judges. See *id.*, at 97, 99, n. 22. America's trial judges operate at the front lines of American justice. In criminal trials, trial judges possess the primary responsibility to enforce *Batson* and prevent racial discrimination from seeping into the jury selection process.

As the *Batson* Court explained and as the Court later reiterated, once a prima facie case of racial discrimination has been established, the prosecutor must provide race-neutral reasons for the strikes. The trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties. The trial judge's assessment of the prosecutor's credibility is often important. The Court has explained that "the best evidence of discriminatory intent

often will be the demeanor of the attorney who exercises the challenge." *Snyder*, 552 U. S., at 477 (quotation altered). "We have recognized that these determinations of credibility and demeanor lie peculiarly within a trial judge's province." *Ibid.* (internal quotation marks omitted). The trial judge must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race. The ultimate inquiry is whether the State was "motivated in substantial part by discriminatory intent." *Foster*, 578 U. S., at 513 (internal quotation marks omitted).

Third, what is the role of appellate review? An appeals court looks at the same factors as the trial judge, but is necessarily doing so on a paper record. "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Batson*, 476 U. S., at 98, n. 21. The Court has described the appellate standard of review of the trial court's factual determinations in a *Batson* hearing as "highly deferential." *Snyder*, 552 U. S., at 479. "On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Id.*, at 477.

III

In accord with the principles set forth in *Batson*, we now address Flowers' case.

The Constitution forbids striking even a single prospective juror for a discriminatory purpose. See *Foster*, 578 U. S., at 499. The question for this Court is whether the Mississippi trial court clearly erred in concluding that the State was not "motivated in substantial part by discriminatory intent" when exercising peremptory strikes at Flowers' sixth trial. *Id.*, at 513 (internal quotation marks omitted); see also *Snyder*, 552 U. S., at 477. Because this case arises on direct review, we owe no deference to the Mississippi Su-

preme Court, as distinct from deference to the Mississippi trial court.

Four categories of evidence loom large in assessing the *Batson* issue in Flowers' case: (1) the history from Flowers' six trials, (2) the prosecutor's striking of five of six black prospective jurors at the sixth trial, (3) the prosecutor's dramatically disparate questioning of black and white prospective jurors at the sixth trial, and (4) the prosecutor's proffered reasons for striking one black juror (Carolyn Wright) while allowing other similarly situated white jurors to serve on the jury at the sixth trial. We address each in turn.

A

First, we consider the relevant history of the case. Recall that in *Swain*, the Court held that a defendant may prove racial discrimination by establishing a historical pattern of racial exclusion of jurors in the jurisdiction in question. Indeed, under *Swain*, that was the only way that a defendant could make out a claim that the State discriminated on the basis of race in the use of peremptory challenges.

In *Batson*, the Court ruled that *Swain* had imposed too heavy a burden on defendants seeking to prove that a prosecutor had used peremptory strikes in a racially discriminatory manner. *Batson* lowered the evidentiary burden for defendants to contest prosecutors' use of peremptory strikes and made clear that demonstrating a history of discriminatory strikes in past cases was not necessary.

In doing so, however, *Batson* did not preclude defendants from still using the same kinds of historical evidence that *Swain* had allowed defendants to use to support a claim of racial discrimination. Most importantly for present purposes, after *Batson*, the trial judge may still consider historical evidence of the State's discriminatory peremptory strikes from past trials in the jurisdiction, just as *Swain* had allowed. After *Batson*, the defendant may still cast *Swain*'s "wide net" to gather "'relevant'" evidence. *Miller-El II*,

545 U. S., at 239–240. A defendant may rely on "all relevant circumstances." *Batson*, 476 U. S., at 96–97.

Here, our review of the history of the prosecutor's peremptory strikes in Flowers' first four trials strongly supports the conclusion that his use of peremptory strikes in Flowers' sixth trial was motivated in substantial part by discriminatory intent. (Recall that there is no record evidence from the fifth trial regarding the race of the prospective jurors.)

The numbers speak loudly. Over the course of the first four trials, there were 36 black prospective jurors against whom the State could have exercised a peremptory strike. The State tried to strike all 36. The State used its available peremptory strikes to attempt to strike every single black prospective juror that it could have struck. (At oral argument in this Court, the State acknowledged that statistic. Tr. of Oral Arg. 32.) Not only did the State's use of peremptory strikes in Flowers' first four trials reveal a blatant pattern of striking black prospective jurors, the Mississippi courts themselves concluded on two separate occasions that the State violated *Batson*. In Flowers' second trial, the trial court concluded that the State discriminated against a black juror. Specifically, the trial court determined that one of the State's proffered reasons—that the juror had been inattentive and was nodding off during jury selection—for striking that juror was false, and the trial court therefore sustained Flowers' *Batson* challenge. In Flowers' next trial—his third trial—the prosecutor used all 15 of its peremptories to strike 15 black prospective jurors. The lead opinion of the Mississippi Supreme Court stated: "The instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge." *Flowers*, 947 So. 2d, at 935. The opinion further stated that "the State engaged in racially discriminatory practices during the jury selection process" and that the "case evinces an effort by the State to exclude African-Americans from jury service." *Id.*, at 937, 939.

To summarize the most relevant history: In Flowers' first trial, the prosecutor successfully used peremptory strikes against all of the black prospective jurors. Flowers faced an all-white jury. In Flowers' second trial, the prosecutor tried again to strike all of the black prospective jurors, but the trial court decided that the State could not strike one of those jurors. The jury consisted of 11 white jurors and 1 black juror. In Flowers' third trial, there were 17 black prospective jurors. The prosecutor used 15 out of 15 peremptory strikes against black prospective jurors. After one black juror was struck for cause and the prosecutor ran out of strikes, one black juror remained. The jury again consisted of 11 white jurors and 1 black juror. In Flowers' fourth trial, the prosecutor again used 11 out of 11 peremptory strikes against black prospective jurors. Because of the large number of black prospective jurors at the trial, the prosecution ran out of peremptory strikes before it could strike all of the black prospective jurors. The jury for that trial consisted of seven white jurors and five black jurors, and the jury was unable to reach a verdict. To reiterate, there is no available information about the race of prospective jurors in the fifth trial. The jury for that trial consisted of nine white jurors and three black jurors, and the jury was unable to reach a verdict.

Stretching across Flowers' first four trials, the State employed its peremptory strikes to remove as many black prospective jurors as possible. The State appeared to proceed as if *Batson* had never been decided. The State's relentless, determined effort to rid the jury of black individuals strongly suggests that the State wanted to try Flowers before a jury with as few black jurors as possible, and ideally before an all-white jury. The trial judge was aware of the history. But the judge did not sufficiently account for the history when considering Flowers' *Batson* claim.

The State's actions in the first four trials necessarily inform our assessment of the State's intent going into Flowers'

sixth trial. We cannot ignore that history. We cannot take that history out of the case.

B

We turn now to the State's strikes of five of the six black prospective jurors at Flowers' sixth trial, the trial at issue here. As *Batson* noted, a "'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." 476 U. S., at 97.

Flowers' sixth trial occurred in June 2010. At trial, 26 prospective jurors were presented to potentially serve on the jury. Six of the prospective jurors were black. The State accepted one black prospective juror—Alexander Robinson. The State struck the other five black prospective jurors—Carolyn Wright, Tashia Cunningham, Edith Burnside, Flancie Jones, and Dianne Copper. The resulting jury consisted of 11 white jurors and 1 black juror.

The State's use of peremptory strikes in Flowers' sixth trial followed the same pattern as the first four trials, with one modest exception: It is true that the State accepted one black juror for Flowers' sixth trial. But especially given the history of the case, that fact alone cannot insulate the State from a *Batson* challenge. In *Miller-El II*, this Court skeptically viewed the State's decision to accept one black juror, explaining that a prosecutor might do so in an attempt "to obscure the otherwise consistent pattern of opposition to" seating black jurors. 545 U. S., at 250. The overall record of this case suggests that the same tactic may have been employed here. In light of all of the circumstances here, the State's decision to strike five of the six black prospective jurors is further evidence suggesting that the State was motivated in substantial part by discriminatory intent.

C

We next consider the State's dramatically disparate questioning of black and white prospective jurors in the jury se-

lection process for Flowers' sixth trial. As *Batson* explained, "the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." 476 U. S., at 97.

The questioning process occurred through an initial group *voir dire* and then more in-depth follow-up questioning by the prosecutor and defense counsel of individual prospective jurors. The State asked the five black prospective jurors who were struck a total of 145 questions. By contrast, the State asked the 11 seated white jurors a total of 12 questions. On average, therefore, the State asked 29 questions to each struck black prospective juror. The State asked an average of one question to each seated white juror.

One can slice and dice the statistics and come up with all sorts of ways to compare the State's questioning of excluded black jurors with the State's questioning of the accepted white jurors. But any meaningful comparison yields the same basic assessment: The State spent far more time questioning the black prospective jurors than the accepted white jurors.

The State acknowledges, as it must under our precedents, that disparate questioning can be probative of discriminatory intent. See *Miller-El* v. *Cockrell*, 537 U. S. 322, 331–332, 344–345 (2003) (*Miller-El I*). As *Miller-El I* stated, "if the use of disparate questioning is determined by race at the outset, it is likely [that] a justification for a strike based on the resulting divergent views would be pretextual. In this context the differences in the questions posed by the prosecutors are some evidence of purposeful discrimination." *Id.*, at 344.

But the State here argues that it questioned black and white prospective jurors differently only because of differences in the jurors' characteristics. The record refutes that explanation.

For example, Dianne Copper was a black prospective juror who was struck. The State asked her 18 follow-up questions about her relationships with Flowers' family and with witnesses in the case. App. 188–190. Pamela Chesteen was a white juror whom the State accepted for the jury. Although the State asked questions of Chesteen during group *voir dire*, the State asked her no individual follow-up questions about her relationships with Flowers' family, even though the State was aware that Chesteen knew several members of Flowers' family. Compare *id.*, at 83, with *id.*, at 111. Similarly, the State asked no individual follow-up questions to four other white prospective jurors who, like Dianne Copper, had relationships with defense witnesses, even though the State was aware of those relationships. Those white prospective jurors were Larry Blaylock, Harold Waller, Marcus Fielder, and Bobby Lester.

Likewise, the State conducted disparate investigations of certain prospective jurors. Tashia Cunningham, who is black, stated that she worked with Flowers' sister, but that the two did not work closely together. To try to disprove that statement, the State summoned a witness to challenge Cunningham's testimony. *Id.*, at 148–150. The State apparently did not conduct similar investigations of white prospective jurors.

It is certainly reasonable for the State to ask follow-up questions or to investigate the relationships of jurors to the victims, potential witnesses, and the like. But white prospective jurors who were acquainted with the Flowers' family or defense witnesses were not questioned extensively by the State or investigated. White prospective jurors who admitted that they or a relative had been convicted of a crime were accepted without apparent further inquiry by the State. The difference in the State's approaches to black and white prospective jurors was stark.

Why did the State ask so many more questions—and conduct more vigorous inquiry—of black prospective jurors than

it did of white prospective jurors? No one can know for certain. But this Court's cases explain that disparate questioning and investigation of prospective jurors on the basis of race can arm a prosecutor with seemingly race-neutral reasons to strike the prospective jurors of a particular race. See *Miller-El I*, 537 U. S., at 331–332, 344–345. In other words, by asking a lot of questions of the black prospective jurors or conducting additional inquiry into their backgrounds, a prosecutor can try to find some pretextual reason—any reason—that the prosecutor can later articulate to justify what is in reality a racially motivated strike. And by not doing the same for white prospective jurors, by not asking white prospective jurors those same questions, the prosecutor can try to distort the record so as to thereby avoid being accused of treating black and white jurors differently. Disparity in questioning and investigation can produce a record that says little about white prospective jurors and is therefore resistant to characteristic-by-characteristic comparisons of struck black prospective jurors and seated white jurors. Prosecutors can decline to seek what they do not want to find about white prospective jurors.

A court confronting that kind of pattern cannot ignore it. The lopsidedness of the prosecutor's questioning and inquiry can itself be evidence of the prosecutor's objective as much as it is of the actual qualifications of the black and white prospective jurors who are struck or seated. The prosecutor's dramatically disparate questioning of black and white prospective jurors—at least if it rises to a certain level of disparity—can supply a clue that the prosecutor may have been seeking to paper the record and disguise a discriminatory intent. See *ibid.*

To be clear, disparate questioning or investigation alone does not constitute a *Batson* violation. The disparate questioning or investigation of black and white prospective jurors may reflect ordinary race-neutral considerations. But the disparate questioning or investigation can also, along with

other evidence, inform the trial court's evaluation of whether discrimination occurred.

Here, along with the historical evidence we described above from the earlier trials, as well as the State's striking of five of six black prospective jurors at the sixth trial, the dramatically disparate questioning and investigation of black prospective jurors and white prospective jurors at the sixth trial strongly suggests that the State was motivated in substantial part by a discriminatory intent. We agree with the observation of the dissenting justices of the Mississippi Supreme Court: The "numbers described above are too disparate to be explained away or categorized as mere happenstance." 240 So. 3d, at 1161 (opinion of King, J.).

D

Finally, in combination with the other facts and circumstances in this case, the record of jury selection at the sixth trial shows that the peremptory strike of at least one of the black prospective jurors (Carolyn Wright) was motivated in substantial part by discriminatory intent. As this Court has stated, the Constitution forbids striking even a single prospective juror for a discriminatory purpose. See *Foster*, 578 U. S., at 499.

Comparing prospective jurors who were struck and not struck can be an important step in determining whether a *Batson* violation occurred. See *Snyder*, 552 U. S., at 483–484; *Miller-El II*, 545 U. S., at 241. The comparison can suggest that the prosecutor's proffered explanations for striking black prospective jurors were a pretext for discrimination. When a prosecutor's "proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination." *Foster*, 578 U. S., at 512 (quotation altered). Although a defendant ordinarily will try to identify a similar white prospective juror whom the State did not strike, a defendant is not required to iden-

tify an *identical* white juror for the side-by-side comparison to be suggestive of discriminatory intent. *Miller-El II*, 545 U. S., at 247, n. 6.

In this case, Carolyn Wright was a black prospective juror who said she was strongly in favor of the death penalty as a general matter. And she had a family member who was a prison security guard. Yet the State exercised a peremptory strike against Wright. The State said it struck Wright in part because she knew several defense witnesses and had worked at Wal-Mart where Flowers' father also worked.

Winona is a small town. Wright had some sort of connection to 34 people involved in Flowers' case, both on the prosecution witness side and the defense witness side. See 240 So. 3d, at 1126. But three white prospective jurors—Pamela Chesteen, Harold Waller, and Bobby Lester—also knew many individuals involved in the case. Chesteen knew 31 people, Waller knew 18 people, and Lester knew 27 people. See *ibid.* Yet as we explained above, the State did not ask Chesteen, Waller, and Lester individual follow-up questions about their connections to witnesses. That is a telling statistic. If the State were concerned about prospective jurors' connections to witnesses in the case, the State presumably would have used individual questioning to ask those potential white jurors whether they could remain impartial despite their relationships. A "State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." *Miller-El II*, 545 U. S., at 246 (internal quotation marks omitted).

Both Carolyn Wright and Archie Flowers, who is the defendant's father, had worked at the local Wal-Mart. But there was no evidence that they worked together or were close in any way. Importantly, the State did not ask individual follow-up questions to determine the nature of their relationship. And during group questioning, Wright said she

did not know whether Flowers' father still worked at Wal-Mart, which "supports an inference that Wright and Flowers did not have a close working relationship." 240 So. 3d, at 1163 (King, J., dissenting). And white prospective jurors also had relationships with members of Flowers' family. Indeed, white prospective juror Pamela Chesteen stated that she had provided service to Flowers' family members at the bank and that she knew several members of the Flowers family. App. 83. Likewise, white prospective juror Bobby Lester worked at the same bank and also encountered Flowers' family members. *Id.*, at 86. Although Chesteen and Lester were questioned during group *voir dire*, the State did not ask Chesteen or Lester individual follow-up questions in order to explore the depth of their relationships with Flowers' family. And instead of striking those jurors, the State accepted them for the jury. To be sure, both Chesteen and Lester were later struck by the defense. But the State's acceptance of Chesteen and Lester necessarily informs our assessment of the State's intent in striking similarly situated black prospective jurors such as Wright.

The State also noted that Wright had once been sued by Tardy Furniture for collection of a debt 13 years earlier. *Id.*, at 209. Wright said that the debt was paid off and that it would not affect her evaluation of the case. *Id.*, at 71, 90–91. The victims in this case worked at Tardy Furniture. But the State did not explain how Wright's 13-year-old, paid-off debt to Tardy Furniture could affect her ability to serve impartially as a juror in this quadruple murder case. The "State's unsupported characterization of the lawsuit is problematic." 240 So. 3d, at 1163 (King, J., dissenting). In any event, the State did not purport to rely on that reason alone as the basis for the Wright strike, and the State in this Court does not rely on that reason alone in defending the Wright strike.

The State also explained that it exercised a peremptory strike against Wright because she had worked with one of

Flowers' sisters. App. 209. That was incorrect. The trial judge immediately stated as much. *Id.*, at 218–219. But incorrect statements of that sort may show the State's intent: When a prosecutor misstates the record in explaining a strike, that misstatement can be another clue showing discriminatory intent.

That incorrect statement was not the only one made by the prosecutor. The State made apparently incorrect statements to justify the strikes of black prospective jurors Tashia Cunningham, Edith Burnside, and Flancie Jones. The State contradicted Cunningham's earlier statement that she had only a working relationship with Flowers' sister by inaccurately asserting that Cunningham and Flowers' sister were close friends. See *id.*, at 84, 220. The State asserted that Burnside had tried to cover up a Tardy Furniture suit. See *id.*, at 226. She had not. See *id.*, 70–71. And the State explained that it struck Jones in part because Jones was Flowers' aunt. See *id.*, at 229. That, too, was not true. See *id.*, at 86–88. The State's pattern of factually inaccurate statements about black prospective jurors suggests that the State intended to keep black prospective jurors off the jury. See *Foster*, 578 U. S., at 512–513; *Miller-El II*, 545 U. S., at 240, 245.

To be sure, the back and forth of a *Batson* hearing can be hurried, and prosecutors can make mistakes when providing explanations. That is entirely understandable, and mistaken explanations should not be confused with racial discrimination. But when considered with other evidence of discrimination, a series of factually inaccurate explanations for striking black prospective jurors can be telling. So it is here.

The side-by-side comparison of Wright to white prospective jurors whom the State accepted for the jury cannot be considered in isolation in this case. In a different context, the Wright strike might be deemed permissible. But we must examine the whole picture. Our disagreement with

the Mississippi courts (and our agreement with Justice King's dissent in the Mississippi Supreme Court) largely comes down to whether we look at the Wright strike in isolation or instead look at the Wright strike in the context of all the facts and circumstances. Our precedents require that we do the latter. As Justice King explained in his dissent in the Mississippi Supreme Court, the Mississippi courts appeared to do the former. 240 So. 3d, at 1163–1164. As we see it, the overall context here requires skepticism of the State's strike of Carolyn Wright. We must examine the Wright strike in light of the history of the State's use of peremptory strikes in the prior trials, the State's decision to strike five out of six black prospective jurors at Flowers' sixth trial, and the State's vastly disparate questioning of black and white prospective jurors during jury selection at the sixth trial. We cannot just look away. Nor can we focus on the Wright strike in isolation. In light of all the facts and circumstances, we conclude that the trial court clearly erred in ruling that the State's peremptory strike of Wright was not motivated in substantial part by discriminatory intent.

* * *

In sum, the State's pattern of striking black prospective jurors persisted from Flowers' first trial through Flowers' sixth trial. In the six trials combined, the State struck 41 of the 42 black prospective jurors it could have struck. At the sixth trial, the State struck five of six. At the sixth trial, moreover, the State engaged in dramatically disparate questioning of black and white prospective jurors. And it engaged in disparate treatment of black and white prospective jurors, in particular by striking black prospective juror Carolyn Wright.

To reiterate, we need not and do not decide that any one of those four facts alone would require reversal. All that we need to decide, and all that we do decide, is that all of the relevant facts and circumstances taken together estab-

lish that the trial court at Flowers' sixth trial committed clear error in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was not motivated in substantial part by discriminatory intent. In reaching that conclusion, we break no new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case.

We reverse the judgment of the Supreme Court of Mississippi, and we remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE ALITO, concurring.

As the Court takes pains to note, this is a highly unusual case. Indeed, it is likely one of a kind. In 1996, four defenseless victims, three white and one black, were slaughtered in a furniture store in a small town in Montgomery County, Mississippi, a jurisdiction with fewer than 11,000 inhabitants. One of the victims was the owner of the store, which was widely frequented by residents of the community. The person prosecuted for this crime, petitioner Curtis Flowers, an African-American, comes from a local family whose members make up a gospel group and have many community ties.

By the time jury selection began in the case now before us, petitioner had already been tried five times for committing that heinous and inflammatory crime. Three times, petitioner was convicted and sentenced to death, but all three convictions were reversed by the State Supreme Court. Twice, the jurors could not reach a unanimous verdict. In all of the five prior trials, the State was represented by the same prosecutor, and as the Court recounts, many of those trials were marred by racial discrimination in the selection of jurors and prosecutorial misconduct. Nevertheless, the prosecution at the sixth trial was led by the same prosecutor, and the case was tried in Montgomery

County where, it appears, a high percentage of the potential jurors have significant connections to either petitioner, one or more of the victims, or both.

These connections and the community's familiarity with the case were bound to complicate a trial judge's task in trying to determine whether the prosecutor's asserted reason for striking a potential juror was a pretext for racial discrimination, and that is just what occurred. Petitioner argues that the prosecution improperly struck five black jurors, but for each of the five, the prosecutor gave one or more reasons that not only were facially legitimate but were of a nature that would be of concern to a great many attorneys. If another prosecutor in another case in a larger jurisdiction gave any of these reasons for exercising a peremptory challenge and the trial judge credited that explanation, an appellate court would probably have little difficulty affirming that finding. And that result, in all likelihood, would not change based on factors that are exceedingly difficult to assess, such as the number of *voir dire* questions the prosecutor asked different members of the venire.

But this is not an ordinary case, and the jury selection process cannot be analyzed as if it were. In light of all that had gone before, it was risky for the case to be tried once again by the same prosecutor in Montgomery County. Were it not for the unique combinations of circumstances present here, I would have no trouble affirming the decision of the Supreme Court of Mississippi, which conscientiously applied the legal standards applicable in less unusual cases. But viewing the totality of the circumstances present here, I agree with the Court that petitioner's capital conviction cannot stand.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins as to Parts I, II, and III, dissenting.

On a summer morning in July 1996 in Winona, Mississippi, 16-year-old Derrick "Bobo" Stewart arrived for the second

day of his first job. He and Robert Golden had been hired by the Tardy Furniture store to replace petitioner Curtis Flowers, who had been fired a few days prior and had his paycheck docked for damaging store property and failing to show up for work. Another employee, Sam Jones, Jr., planned to teach Stewart and Golden how to properly load furniture.

On Jones' arrival, he found a bloodbath. Store owner Bertha Tardy and bookkeeper Carmen Rigby had each been murdered with a single gunshot to the head. Golden had been murdered with two gunshots to the head, one at very close range. And Stewart had been shot, execution style, in the back of his head. When Jones entered the store, Stewart was fighting for every breath, blood pouring over his face. He died a week later.

On the morning of the murders, a .380-caliber pistol was reported stolen from the car of Flowers' uncle, and a witness saw Flowers by that car before the shootings. Officers recovered .380-caliber bullets at Tardy Furniture and matched them to bullets fired by the stolen pistol. Gunshot residue was found on Flowers' hand a few hours after the murders. A bloody footprint found at the scene matched both the size of Flowers' shoes and the shoe style that he was seen wearing on the morning of the murders. Multiple witnesses placed Flowers near Tardy Furniture that morning, and Flowers provided inconsistent accounts of his whereabouts. Several hundred dollars were missing from the store's cash drawer, and $235 was found hidden in Flowers' headboard after the murders. 240 So. 3d 1082, 1092–1095, 1107 (Miss. 2017).

In the 2010 trial at issue here, Flowers was convicted of four counts of murder and sentenced to death. Applying heightened scrutiny, the state courts found that the evidence was more than sufficient to convict Flowers, that he was tried by an impartial jury, and that the State did not engage in purposeful race discrimination in jury selection in viola-

tion of the Equal Protection Clause. *Id.*, at 1096, 1113, 1139, 1135.

The Court today does not dispute that the evidence was sufficient to convict Flowers or that he was tried by an impartial jury. Instead, the Court vacates Flowers' convictions on the ground that the state courts clearly erred in finding that the State did not discriminate based on race when it struck Carolyn Wright from the jury.

The only clear errors in this case are committed by today's majority. Confirming that we never should have taken this case, the Court almost entirely ignores—and certainly does not refute—the race-neutral reasons given by the State for striking Wright and four other black prospective jurors. Two of these prospective jurors knew Flowers' family and had been sued by Tardy Furniture—the family business of one of the victims and also of one of the trial witnesses. One refused to consider the death penalty and apparently lied about working side by side with Flowers' sister. One was related to Flowers and lied about her opinion of the death penalty to try to get out of jury duty. And one said that because she worked with two of Flowers' family members, she might favor him and would not consider only the evidence presented. The state courts' findings that these strikes were not based on race are the opposite of clearly erroneous; they are clearly correct. The Court attempts to overcome the evident race neutrality of jury selection in this trial by pointing to a supposed history of race discrimination in previous trials. But 49 of the State's 50 peremptory strikes in Flowers' previous trials were race neutral. The remaining strike occurred 20 years ago in a trial involving only one of Flowers' crimes and was never subject to appellate review; the majority offers no plausible connection between that strike and Wright's.

Today's decision distorts the record of this case, eviscerates our standard of review, and vacates four murder convic-

tions because the State struck a juror who would have been stricken by any competent attorney. I dissent.

I

Twice now, the Court has made the mistake of granting this case. The first time, this case was one of three that the Court granted, vacated, and remanded in light of *Foster* v. *Chatman*, 578 U. S. 488 (2016), which involved a challenge under *Batson* v. *Kentucky*, 476 U. S. 79 (1986). See *Flowers* v. *Mississippi*, 579 U. S. 913 (2016). But "*Foster* did not change or clarify the *Batson* rule in any way," so remanding was senseless and unproductive: "Without pointing out any errors in the State Supreme Court's analysis" or bothering to explain how *Foster* was relevant, "the [Court] simply order[ed] the State Supreme Court to redo its work." *Flowers*, 579 U. S., at 913, 915 (ALITO, J., dissenting from decision to grant, vacate, and remand).

Unsurprisingly, no one seemed to understand *Foster*'s relevance on remand. The defendants simply "re-urge[d] the arguments [they] had raised" before, and all three courts promptly reinstated their prior decisions—confirming the impropriety of the entire enterprise. 240 So. 3d, at 1117–1118, 1153; *State* v. *Williams*, 2013–0283 (La. App. 4 Cir. 9/7/16), 199 So. 3d 1222, 1230, 1238 (pointing out that "*Foster* did not change the applicable principles for analyzing a *Batson* claim"); *Ex parte Floyd*, 227 So. 3d 1, 13 (Ala. 2016).

Flowers then filed another petition for certiorari, raising the same question as his first petition: whether a prosecutor's history of *Batson* violations is irrelevant when assessing the credibility of his proffered explanations for peremptory strikes. Under our ordinary certiorari criteria, we would never review this issue. There is no disagreement among the lower courts on this question, and the question is not implicated by this case—the Mississippi Supreme Court *did* consider the prosecutor's history, see 240 So. 3d, at 1122–1124, 1135, and, to the extent there is a relevant history here, it is one of race-*neutral* strikes, see Part III, *infra*.

Nonetheless, Flowers' question presented at least had the virtue of being a question of law that could affect *Batson*'s application. Unchastened by its *Foster* remand, however, the Court granted certiorari and changed the question presented to ask merely whether the Mississippi Supreme Court had misapplied *Batson* in this particular case. In other words, the Court tossed aside any pretense of resolving a legal question so it could reconsider the factual findings of the state courts. In so doing, the Court disregards the rule that "[w]e do not grant a certiorari to review evidence and discuss specific facts," *United States* v. *Johnston*, 268 U. S. 220, 227 (1925), particularly where there are "'concurrent findings of fact by two courts below,'" *Exxon Co., U. S. A.* v. *Sofec, Inc.*, 517 U. S. 830, 841 (1996).

The Court does not say why it disregarded our traditional criteria to take this case. It is not as if the Court lacked better options. See *Gee* v. *Planned Parenthood of Gulf Coast, Inc.*, 586 U. S. 1057 (2018) (THOMAS, J., dissenting from denial of certiorari). Perhaps the Court lacked confidence in the proceedings below. Flowers' case, like the others needlessly remanded in light of *Foster*, comes to us from a state court in the South. These courts are "familiar objects of the Court's scorn," *United States* v. *Windsor*, 570 U. S. 744, 795 (2013) (Scalia, J., dissenting), especially in cases involving race.[1]

Or perhaps the Court granted certiorari because the case has received a fair amount of media attention. But if so, the Court's action only encourages the litigation and relitigation of criminal trials in the media, to the potential detriment of all parties—including defendants. The media often seeks "to titillate rather than to educate and inform." *Chandler* v. *Florida*, 449 U. S. 560, 580 (1981). And the Court has "long recognized that adverse publicity can endanger the

[1] *E. g., Tharpe* v. *Sellers*, 583 U. S. 33 (2018) (*per curiam*); *Buck* v. *Davis*, 580 U. S. 100 (2017); *Foster* v. *Chatman*, 578 U. S. 488 (2016); *In re Davis*, 557 U. S. 952 (2009); *Snyder* v. *Louisiana*, 552 U. S. 472 (2008).

ability of a defendant to receive a fair trial," by "influenc[ing] public opinion" and "inform[ing] potential jurors of . . . information wholly inadmissible at the actual trial." *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 378 (1979); *e. g., Sheppard* v. *Maxwell*, 384 U. S. 333, 356–363 (1966); *Irvin* v. *Dowd*, 366 U. S. 717, 725–728 (1961). Media attention can produce other dangers, too, including discouraging reluctant witnesses from testifying and encouraging eager witnesses, prosecutors, defense counsel, and even judges to perform for the audience. See *Estes* v. *Texas*, 381 U. S. 532, 591 (1965) (Harlan, J., concurring). Any appearance that this Court gives closer scrutiny to cases with significant media attention will only exacerbate these problems and undermine the fairness of criminal trials.

Whatever the Court's reason for taking this case, we should have dismissed it as improvidently granted. If the Court wanted to simply review the state courts' application of *Batson*, it at least could have had the decency to do so the first time around. Instead, the Court wasted the State's, defendant's, and lower court's time and resources—to say nothing of prolonging the ongoing "nightmare" of Bobo Stewart's and the other victims' families as they await justice. Tr. 3268–3272. And now, the majority considers it a point of pride to "break no new legal ground," *ante*, at 288, 316, and proceeds to second-guess the factual findings of two different courts on matters wholly collateral to the merits of the conviction. If nothing else, its effort proves the reason behind the rule that we do not take intensively fact-specific cases.

II

The majority's opinion is so manifestly incorrect that I must proceed to the merits. Flowers presented no evidence whatsoever of purposeful race discrimination by the State in selecting the jury during the trial below. Each of the five challenged strikes was amply justified on race-neutral grounds timely offered by the State at the *Batson* hearing.

None of the struck black jurors was remotely comparable to the seated white jurors. And nothing else about the State's conduct at jury selection—whether trivial mistakes of fact or supposed disparate questioning—provides any evidence of purposeful discrimination based on race.

A

1

The majority focuses its discussion on potential juror Carolyn Wright, but the State offered multiple race-neutral reasons for striking her. To begin, Wright lost a lawsuit to Tardy Furniture soon after the murders, and a garnishment order was issued against her. App. 71–72; Record 2697. Noting that Wright claimed the lawsuit "would not affect her evaluation of the case," the majority questions how this lawsuit "could affect [Wright's] ability to serve impartially." *Ante*, at 313. But the potential bias is obvious. The "victims in this case" did not merely "wor[k] at Tardy Furniture." *Ibid.* At the time of the murders, Bertha Tardy owned Tardy Furniture. Following her murder, her daughter and son-in-law succeeded her as owners; they sued Wright, and the daughter testified at this trial. See App. 71, 209; 240 So. 3d, at 1093; Tr. 1656. Neither the trial court nor Flowers suffered from any confusion as to how losing a lawsuit to a trial witness and daughter of a victim might affect a juror. See App. 280, and n. 2; Recording of Oral Arg. 13:40–13:47 in No. 2010–DP–01348–SCT (Miss., July 21, 2014) (Flowers' counsel arguing that "the potential jurors who were sued by" Tardy had more "basis for being upset with her" than Flowers did), https://judicial.mc.edu/case.php?id=1122570. Indeed, a portion of the daughter's testimony focused on obtaining judgments and garnishments against customers who did not pay off their accounts. Tr. 2672–2674.

Faced with this strong race-neutral reason for striking Wright, the majority first suggests that the State did not

adequately explain how the lawsuit could affect Wright. But it is obvious, and in any event the majority is wrong—the State *did* spell it out. See App. 209 ("She was sued by Tardy Furniture, after these murders, by the family members that will be testifying here today"). Moreover, Flowers did not ask for further explanation, instead claiming that "there is no evidence of an actual lawsuit," *id.*, at 211, even though Wright had admitted it, *id.*, at 71–72. The State then entered into the record a copy of the judgment containing a garnishment amount. *Id.*, at 215; see Record 2697.

Second, the majority quotes the dissent below for the proposition that the "'State's unsupported characterization of the lawsuit is problematic.'" *Ante*, at 313. But the Court neglects to mention that the dissent's basis for this statement was that "[n]othing in the record supports the contention that Wright's wages were garnished." 240 So. 3d, at 1162 (King, J., dissenting). Again, that is incorrect. See Record 2697.

Finally, the majority dismisses the lawsuit's significance because "the State did not purport to rely on that reason *alone* as the basis for the Wright strike." *Ante*, at 313 (emphasis added). But the fact that the State had *additional* race-neutral reasons to strike Wright does not make the lawsuit any less of a race-neutral reason. As the State explained, Wright knew nearly every defense witness and had worked with Flowers' father at what the trial court described as the "smallest Wal-Mart . . . that I know in existence." App. 218. The majority tries to minimize this connection by pointing out that "Wright said she did not know whether Flowers' father still worked at Wal-Mart." *Ante*, at 312–313. That is understandable, given that Wright testified that *she* no longer worked at the Wal-Mart. Tr. 782. The majority misses the point: Wright had worked in relatively close proximity with the defendant's father.[2]

[2] The majority also complains that the State did not ask enough "follow-up questions" of Wright. *Ante*, at 312. I see no reason why the State needed more information. Besides, if the State *had* asked more ques-

The majority, while admonishing trial courts to "consider the prosecutor's race-neutral explanations," *ante*, at 302, completely ignores the State's race-neutral explanations for striking the other four black jurors.

Tashia Cunningham stated repeatedly that she "d[id]n't believe in the death penalty" and would "not even consider" it. App. 129; see 2d Supp. Record 256b. When pressed by the trial court on this point, she vacillated, saying that she "d[id]n't think" she could consider the death penalty but then, "I might. I might. I don't know. I might." App. 130. Opposition to the death penalty is plainly a valid, race-neutral reason for a strike. Moreover, Cunningham knew Flowers' sister, having worked with her on an assembly line for several years. *Id.*, at 83–85. She testified that they did not work in close proximity, but a supervisor testified that they actually worked "side by side." *Id.*, at 149–152. Both this apparent misstatement and the fact that Cunningham worked with Flowers' sister are valid, race-neutral reasons.

Next, Edith Burnside knew Flowers personally. Flowers had visited in her home, lived one street over, and played basketball with her sons. *Id.*, at 75, 79–80. Burnside also testified repeatedly that she "could not judge anyone," no "matter what the case was," *id.*, at 69–70, 143–144, and that her "problem with judging" could "affect [her] judgment" here, *id.*, at 144. Finally, she too was sued by Tardy Furniture soon after the murders, and a garnishment order was entered against her. See *id.*, at 71, 141–142; *Tardy Furniture Co.* v. *Burnside*, Civ. No. 1359 (Justice Ct. Montgomery Cty., Miss., June 23, 1997), Dkt. 13, p. 553.

Next, Dianne Copper had worked with both Flowers' father and his sister for "a year or two" each. App. 77, 189, 234, 236. She agreed that because of these relation-

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tions, the majority would complain that the State engaged in "dramatically disparate" questioning of Wright.

ships and others with various defense witnesses, she might "lean toward" Flowers and would be unable to "come in here . . . with an open mind." *Id.*, at 190; see *id.*, at 78. She also said that deciding the case on "the evidence only" would make her "uncomfortable." *Id.*, at 191–192.

Finally, as to Flancie Jones, Flowers conceded below that he "did not challenge [her] strike" and that "'the State's bases for striking Jones appear to be race neutral.'" Supp. Brief for Appellant in No. 2010–DP–01348–SCT (Miss.), p. 20, n. 12. Because any argument as to Jones "was not raised below, it is waived." *Sprietsma* v. *Mercury Marine*, 537 U. S. 51, 56, n. 4 (2002). Even if Flowers had not waived this argument, this strike was obviously supported by race-neutral reasons. Jones was related to Flowers in several ways. See App. 73, 179. She was late to court on multiple occasions. *Id.*, at 180, 182. On her juror questionnaire, she said she was "strongly against the death penalty," but when asked about her opposition, said, "I guess I'd say anything to get off" jury duty. *Id.*, at 181; see 2d Supp. Record 325b. She then admitted that she was not necessarily "being truthful" on her questionnaire but refused to provide her actual view on the death penalty, saying, "I—really and truly . . . don't want to be here." App. 181–182.

3

In terms of race-neutral validity, these five strikes are not remotely close calls. Each strike was supported by multiple race-neutral reasons articulated by the State at the *Batson* hearing and supported by the record. It makes a mockery of *Batson* for this Court to tell prosecutors to "provide race-neutral reasons for the strikes," and to tell trial judges to "consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances," *ante*, at 302, and then completely ignore the State's reasons for four out of five strikes.

Only by ignoring these facts can the Court assert that "the State's decision to strike five of the six black prospective jurors is further evidence suggesting that the State was motivated in substantial part by discriminatory intent." *Ante*, at 307. Putting aside the fact that the majority has its numbers wrong (the State struck five of seven potential black jurors),[3] the bare numbers are meaningless outside the context of the *reasons* for the strikes. The majority has no response whatsoever to the State's race-neutral explanations and, for four of the five strikes, does not dispute the state courts' conclusion that race played no role at all. For *Batson* purposes, these strikes might as well have been exercised against white jurors. Yet the majority illegitimately counts them all against the State.

B

Given the multiple race-neutral reasons for the State's strikes, evidence of racial discrimination would have to be overwhelming to show a *Batson* violation. The majority's evidence falls woefully short.

As the majority explains, "[c]omparing prospective jurors who were struck and not struck can be an important step in determining whether a *Batson* violation occurred." *Ante*, at 311. For example, "[w]hen a prosecutor's 'proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination.'" *Ibid.* By the same token, a defendant's failure to find any similarly situated whites permitted to serve tends to disprove purposeful discrimination. Here,

[3] The majority ignores the fact that, after the initial *Batson* challenge, the State tendered a black juror as an alternate instead of exercising available peremptory strikes. The State also tendered the first black juror available. This is hardly a "'consistent pattern'" of strikes against black jurors. *Ante*, at 307.

neither the majority nor Flowers has identified any non-struck white jurors remotely similar to any of the struck black jurors.

The majority points to white jurors Pamela Chesteen and Bobby Lester, who worked at the Bank of Winona and therefore had interacted with several members of Flowers' family as bank customers. By the majority's lights, Chesteen's and Lester's banker-customer relationship was the same as Wright's co-worker relationship with Flowers' father. *Ante*, at 312–313. That comparison is untenable. Lester testified that working at the bank meant he and Chesteen "s[aw] everyone in town." App. 86. And as the trial court explained, "a bank teller, who waits on customers at a bank," has a "substantially different" relationship from someone who "work[s] at the same business establishment with members of the defendant's family." *Id.*, at 278; see *id.*, at 236. The Mississippi Supreme Court agreed that "a coworker relationship" and "employee/customer relationship are distinguishable." 240 So. 3d, at 1127. The majority mentions none of this, evidently relying on its superior knowledge of the banker-customer relationships at the Bank of Winona.

The more relevant comparator to Chesteen and Lester is Alexander Robinson, a black man who was a customer at a store where Flowers' brother worked. App. 82. The State confirmed with Robinson that this relationship was "just a working relationship"—*i. e.*, an employee-customer relationship—and immediately thereafter clarified with Chesteen and Lester that their relationships with Flowers' family members was "like Mr. Robinson, just a working relationship." *Id.*, at 82–83, 85–86.[4] The State then tendered Robinson, Chesteen, and Lester as jurors. *Id.*, at 203, 208. Later, the State would strike black jurors Wright and Copper, who were both co-workers of members of Flowers'

[4] Thus, the majority is simply wrong to complain that the State failed to ask Chesteen or Lester "individual follow-up questions" on this issue. *Ante*, at 313.

family. As the trial court understood, it is "evident . . . that the prosecution utilized peremptory strikes only against those individuals who actually worked with, or who in the past had worked with, members of Flowers' family." *Id.*, at 278; see *id.*, at 279.

Next, the majority contends that white jurors Chesteen, Lester, and Harold Waller, like Wright, "knew many individuals involved in the case." *Ante,* at 312. Yet the majority concedes that Wright knew more individuals than any of them. And the more relevant statistic from the State's perspective is how many *defense* witnesses a juror knows, since that knowledge suggests a greater connection to the defendant. By Flowers' own count, Wright knew substantially more defense witnesses than the three white jurors. According to Flowers, Wright knew 19 defense witnesses, while Chesteen knew 14 and Lester and Waller knew around 6 each. See Brief for Petitioner 49, n. 37; Brief for Appellant in No. 2010–DP–01348–SCT (Miss.), p. 114 (Brief for Appellant).

Additional relevant differences existed between Wright and the three white jurors. Wright had been *sued* by a witness and member of the victim's family, and worked at the same store as the defendant's father. Chesteen, on the other hand, was *friends* with the same member of the victim's family and also knew another victim's wife. App. 93–94, 46. The trial court found that Chesteen "had a much closer relationship with members of the victim[s'] families tha[n] she had with anyone in Flowers' family." *Id.*, at 278.

Likewise, Waller knew victim Carmen Rigby and her husband; their children attended school with his daughter, and "[t]hey were involved in school activities together." Tr. 821, 1042. He served on the school board with Rigby. *Id.*, at 1043. And victim Bobo Stewart "went to school with [Waller's] daughter," and Waller knew his family. App. 48, 53.

Similarly, Lester had been friends with Rigby's husband "for years," and he "knew her family." Tr. 822, 1045. Lester's wife taught Stewart first grade. App. 48; Tr. 1045.

Lester was related by marriage to Bertha Tardy and had known the Tardy family his entire life, growing up with Bertha's daughter. *Id.*, at 787–788. His daughter had just graduated with Bertha's grandson, and they were friends. *Id.*, at 788, 1046. As Lester put it, "I have a lot of connections to the [victims'] families." *Id.*, at 788.

Given that these prospective jurors were favorable for the State, it is hardly surprising that the State would not affirmatively "us[e] individual questioning to ask th[e]se potential white jurors whether they could remain impartial despite their relationships" with victims' families or prosecution witnesses, *ante*, at 312, for to do so could invite defense strikes. Revealingly, Flowers' counsel had exhaustively questioned these three white jurors—treating them much differently than Wright. Flowers' counsel asked Wright only a handful of questions, all of which sought to confirm that she could judge impartially. App. 90–91, 105–106. By contrast, Flowers' counsel asked Chesteen more than 30 questions, most of which sought to cast doubt on Chesteen's ability to remain impartial given her relationships with the victims' families. *Id.*, at 93–95, 111–118. Flowers' counsel asked Lester more than 60 questions and Waller about 15 questions along the same lines. Tr. 1045–1047; App. 160–174; Tr. 1042–1044; App. 123–124. Flowers was so concerned about these white jurors' connections with the victims that he tried to strike both Chesteen and Lester—but not Wright—for cause, and when that failed, he exercised peremptory strikes on all three white jurors. Tr. 1622, 1624, 1743–1744; App. 204, 208; see *id.*, at 278.

In short, no reasonable litigant or trial court would consider Wright "similarly situated," *ante*, at 313, to these three white jurors.

C

The majority next discovers "clue[s]" of racial discrimination in minor factual mistakes supposedly made by the State during the *Batson* hearing. *Ante*, at 313–314. As an initial

matter, Flowers forfeited this argument by failing to present it to the trial court. Under *Batson*, the trial court must decide whether, "*in light of the parties' submissions*," "the defendant has shown purposeful discrimination." *Snyder* v. *Louisiana*, 552 U. S. 472, 477 (2008) (emphasis added; internal quotation marks omitted). The Court has made clear that "a prosecutor simply has got to state his reasons as best he can [at the *Batson* hearing] and stand or fall on the plausibility of the reasons he gives." *Miller-El* v. *Dretke*, 545 U. S. 231, 252 (2005).

The same rule must apply to the defendant, the party with the ultimate burden of proving purposeful discrimination. *Johnson* v. *California*, 545 U. S. 162, 170–171 (2005); *Batson*, 476 U. S., at 96–98. Thus, if the defendant makes no argument on a particular point, the trial court's failure to consider that argument cannot be erroneous, much less clearly so. See, *e. g.*, *Davis* v. *Baltimore Gas & Elec. Co.*, 160 F. 3d 1023, 1027–1028 (CA4 1998); *Wright* v. *Harris County*, 536 F. 3d 436, 438 (CA5 2008). Excusing the defendant from making his arguments before the trial court encourages defense counsel to remain silent, prevents the State from responding, deprives the trial court of relevant arguments, and denies reviewing courts a sufficient record. See *Snyder*, *supra*, at 483; *Garraway* v. *Phillips*, 591 F. 3d 72, 76–77 (CA2 2010).[5]

Even if Flowers had not forfeited his argument about the State's "mistakes," it is devoid of merit. The *Batson* hearing was conducted immediately after *voir dire*, before a transcript was available. App. 214; *id.*, at 225–226. In explain-

[5] At a minimum, Mississippi has reasonably read *Batson*'s "'prophylactic framework,'" *Johnson* v. *California*, 545 U. S. 162, 174 (2005) (THOMAS, J., dissenting), to mean that the party making a *Batson* claim forfeits arguments not made to the trial court. See *Pitchford* v. *State*, 45 So. 3d 216, 227–228 (Miss. 2010); accord, Record 2965. Thus, whether as a matter of *Batson* itself or the State's implementation of *Batson*, Flowers forfeited these arguments.

ing their strikes, counsel relied on handwritten notes taken during a fast-paced, multiday *voir dire* involving 156 potential jurors. *Id.*, at 229, 258. Still, the majority comes up with only a few mistakes, and they are either imagined or utterly trivial. The majority claims that the State incorrectly "asserted that Burnside"—one of the struck black jurors—"had tried to cover up a Tardy Furniture suit." *Ante*, at 314. But the State's assertion was at least reasonable. When the State asked Burnside about the lawsuit, she responded that "[i]t wasn't a dispute" and "[w]e never had no misunderstanding about it." App. 141–142. Quite reasonably, the State asked why the matter ended up in court, and Burnside conceded that she had to be sued, even as she insisted that there "was no falling-out about it." *Id.*, at 142. As previously explained, a judgment and garnishment were issued against her.

The majority's other supposed mistakes are inconsequential. First, the State confused which potential juror worked with Flowers' sister, and then corrected its mistake. See *id.*, at 218–219, 234. Second, the State referred to that juror, Tashia Cunningham, as "a close friend" of Flowers' sister, whereas the testimony established only that they worked together closely. *Id.*, at 220. Flowers *agreed* with the "friendship" characterization during the *Batson* hearing, *id.*, at 221, and in any event, whether Cunningham and Flowers' sister were close co-workers or close friends is irrelevant. Third, the State confused struck juror Flancie Jones' familial relationships with Flowers, saying that Flowers' sister was Jones' niece, when in fact Flowers' sister was apparently married to Jones' nephew. *Id.*, at 229, 231. But whatever the precise relationship, even Flowers conceded that Jones had an "in-law relationship to the entire [Flowers] family," so the relevant point remained: Jones was related in multiple ways to Flowers. *Id.*, at 230–231; Tr. 967–968. It is hard to imagine less significant "mistakes."

Tellingly, Flowers' counsel, although aided by "many interns," App. 214, made many more mistakes during this process. *E. g.*, *id.*, at 204–205 (incorrectly identifying a juror); *id.*, at 207–208 (striking a juror and then immediately making an argument premised on not striking that juror); *id.*, at 210 (confusing jurors); *id.*, at 211 (confusing which family members were acquainted with a juror); *id.*, at 212 (incorrectly stating that no general question was asked of all jurors as to accounts or suits with the Tardys, see *id.*, at 70, 217); *id.*, at 222–223 (confusing jurors); *id.*, at 230 ("[M]aybe we didn't get to this juror").[6]

In short, in the context of the trial below, a few trivial errors on secondary or tertiary race-neutral reasons for striking some jurors can hardly be counted as "telling" evidence of race discrimination. *Ante*, at 314; see *ibid.* ("[M]istaken explanations should not be confused with racial discrimination").

[6] These mistakes continued before this Court. Flowers asserts that in his first four trials, the State "struck every black panelist that [it] could," Brief for Petitioner 23; that is false. See *infra*, at 345–346. Flowers says that the State asked potential juror Robinson "a total of five questions," Brief for Petitioner 15, n. 14, but it actually asked 10. See App. 82–83; Tr. 1147–1148. Flowers says that the State "did not question [Robinson] on [his] relationship" with Flowers' brother, Brief for Petitioner 46, n. 35; it did. See App. 82–83. Flowers refers to Bertha Tardy's "son," Brief for Petitioner 52, but Tardy's only child was a daughter. See Tr. 3268. Flowers says that "the Mississippi Supreme Court found two clear *Batson* violations" in the third trial, Brief for Petitioner 32; it did not. See *infra*, at 344–345. Flowers repeatedly refers to "the decidedly false claim that Wright's" and Burnside's "wages had been garnished," Brief for Petitioner 56, 50, 18, 22, n. 24, 51; Tr. of Oral Arg. 8, 11, 12, even though that claim is true. See *supra*, at 322–326. Flowers said that Wright "still work[ed]" at Wal-Mart at the time of jury selection, Tr. of Oral Arg. 16; she did not. Tr. 782. Flowers agreed that in this trial, the State struck "every black juror that was available on the panel" after "the first one," Tr. of Oral Arg. 57–58; Reply Brief 1, but it did not. See App. 241 (tendering a black juror as an alternate).

D

Turning to even less probative evidence, the majority asserts that the State engaged in disparate—"dramatically disparate," the majority repeats, *ante,* at 288, 304, 307, 310, 311, 315—questioning based on race. By the majority's count, "[t]he State asked the five black prospective jurors who were struck a total of 145 questions" and "the 11 seated white jurors a total of 12 questions." *Ante,* at 308. The majority's statistical "evidence" is irrelevant and misleading.

First, the majority finds that only one juror—Carolyn Wright—was struck on the basis of race, but it neglects to mention that the State asked her only five questions. See App. 71–72, 104–105. Of course, the majority refuses to identify the "certain level of disparity" that meets its "dramatically disparate" standard, *ante,* at 310, but its failure to recognize that the only juror supposedly discriminated against was asked hardly any questions suggests the majority is "slic[ing] and dic[ing]" statistics, *ante,* at 308. Asking other black jurors more questions would be an odd way of "try[ing] to find some pretextual reason" to strike Wright. *Ante,* at 310.

Second, both sides asked a similar number of questions to the jurors they peremptorily struck. This is to be expected—a party will often ask more questions of jurors whose answers raise potential problems. Among other reasons, a party may wish to build a case for a cause strike, and if a cause strike cannot be made, those jurors are more likely to be peremptorily struck. Here, Flowers asked the jurors he struck—all white, Tr. of Oral Arg. 57—an average of about 40 questions, and the State asked the black jurors it struck an average of about 28 questions. The number of questions asked by the State to these jurors is not evidence of race discrimination.

Moreover, the majority forgets that correlation is not causation. The majority appears to assume that the only relevant difference between the black jurors at issue and seated

white jurors is their race. But reality is not so simple. Deciding whether a statistical disparity is caused by a particular factor requires controlling for other potentially relevant variables; otherwise, the difference could be explained by other influences. See Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. 702, 709 (1980); cf. *Box* v. *Planned Parenthood of Ind. & Ky., Inc.*, 587 U. S. 490, 501, n. 4 (2019) (THOMAS, J., concurring) (showing that bare statistical disparities can be used to support diametrically different theories of causation). Yet the majority's raw comparison of questions does not control for any of the important differences between struck and seated jurors. See *supra*, at 327–330. This defective analysis does not even begin to provide probative evidence of discrimination. See, *e. g.*, *People Who Care* v. *Rockford Bd. of Ed., School Dist. No. 205*, 111 F. 3d 528, 537 (CA7 1997) (Posner, C. J.) ("[A] statistical study that fails to correct for salient explanatory variables, or even to make the most elementary comparisons, has no value as causal explanation"). Indeed, it is difficult to conceive of a statistical study that could possibly control for all of the relevant variables in this context, including tone of voice, facial expressions, and other relevant information.

Most fundamentally, the majority's statistics are divorced from the realities of this case. Winona is a very small town, and "this was the biggest crime that had ever occurred" there. Tr. 1870. As one juror explained, "[e]verybody in Winona has probably" heard about the case. *Id.*, at 1180; accord, *id.*, at 1183 (Flowers' counsel stating the same). One potential juror knew almost everyone "involved in it" between her job as a teacher and attendance at church. App. 81–82. Tardy Furniture "basically did business with the whole Winona community." Tr. 2667.

Moreover, Flowers' family was "very, very prominent" in Winona's black community. *Id.*, at 1750. As the trial court explained,

> "Flowers has a number of brothers and sisters. His parents are well-known. [His father] is apparently one of the most well-thought of people in this community. You have had countless numbers of African-American individuals that have come in and said they could not sit in judgment because of their knowledge of Mr. Flowers, and they could not be fair and impartial." App. 197; see *id.*, at 199–200; Tr. 1750.

Flowers' counsel stated that when Flowers' father "was working as a greeter at Wal-Mart," there was "probably not a person in Winona who wouldn't have said, 'Mr. Archie's my friend.'" App. 221. According to the trial court, "the overwhelming majority" of potential black jurors "stated that they could not sit in judgment of him because of kinships, friendships, and family ties." *Id.*, at 256.

To obtain a sufficient jury pool, the trial court had to call 600 potential jurors. *Id.*, at 258. In such a small county, that meant a man, his wife, his mother, and his father were all called for jury duty in this case. See Tr. 939–941. According to Flowers,

> "seventy-five percent of the total qualified venire, sixty-three percent of the venire members actually tendered for acceptance or rejection as jurors, and forty percent of the persons empanelled as jurors or alternates (six of 15) were personally acquainted with either the defendant or one or more of the decedents or their families and/or had actual opinions as to guilt or innocence formed prior [to] the trial." Brief for Appellant 130.

Before peremptory strikes even started, the venire had gone from 42% to 28% black. App. 194–195. As the trial court explained, "nothing the State has done has caused this statistical abnormality." *Id.*, at 198. Instead, any "statistical abnormality" "is strictly because of the prominence of [Flowers'] family." *Id.*, at 200. Flowers' counsel admitted that she was not "surprise[d]" by the reduction given the

circumstances and the experiences in the previous trials. *Id.*, at 199.[7]

The state courts appropriately viewed the parties' questioning in light of these circumstances. The Mississippi Supreme Court, for example, found that the State "asked more questions" of the "jurors who knew more about the case, who had personal relationships with Flowers's family members, who said they could not be impartial, or who said they could not impose the death penalty," and that "[t]hose issues are appropriate for followup questions." 240 So. 3d, at 1125. The court also found that "[t]he State's assertion that elaboration and followup questions were needed with more of the African-American jurors is supported by the record." *Ibid.* The majority wonders why "the State spent far more time questioning the black prospective jurors" and concludes that "[n]o one can know." *Ante*, at 308, 310. But even Flowers admits that "more African-American jurors knew the parties, most of the [State's] follow-up questions pertained to relevant matters, [and] more questions were asked of jurors who had personal relationships about the case, or qualms about the death penalty." Pet. for Cert. 23 (emphasis deleted).

The majority ignores Flowers' concession, but the questions asked by the State bear it out. The State's questions also refute the majority's suggestion that the State did "not as[k] white prospective jurors th[e] same questions." *Ante*, at 310. The State asked all potential jurors whether Tardy Furniture sued them, and only Wright and Burnside

[7] One trial had to be moved to a new venue because "during *voir dire* it became apparent that a fair and impartial jury could not be impaneled." *Flowers* v. *State*, 842 So. 2d 531, 535 (Miss. 2003). At another trial, one of two black jurors seated was "excused after he informed the judge that he could not be a fair and impartial juror." *Flowers* v. *State*, 947 So. 2d 910, 916 (Miss. 2007). And at the next trial, one of the alternate jurors, who was black, was convicted of perjury after it came to light that she had lied during *voir dire* about not knowing Flowers and had visited him in jail. 240 So. 3d 1082, 1137 (Miss. 2017).

answered in the affirmative. See App. 70–71, 99–100, 217–218. Two of five questions to Wright and around eight questions to Burnside followed up on this lawsuit. *Id.*, at 70–72, 141–143. All potential jurors were asked whether they knew Flowers' father, and no white jurors had worked with him at Wal-Mart. *Id.*, at 61, 218. Two of Wright's remaining three questions followed up on this relationship. *Id.*, at 104–105. The State asked all potential jurors whether anyone lived in the areas around Flowers' house, and no white jurors answered in the affirmative. *Id.*, at 75–81. Seven questions to Copper—another black prospective juror—and three to Burnside followed up on this geographic proximity. *Id.*, at 75–77, 79–80. Copper's remaining questions were mostly about her working with Flowers' father and sister and her statement that she would lean in Flowers' favor. *Id.*, at 77–78, 189–190. Burnside's remaining questions were mostly about Flowers' visits to her house and her statement that she could not judge others. *Id.*, at 80–81, 143–144. The State asked all potential jurors whether anyone was related to Flowers' family, and only Jones, a black prospective juror, answered affirmatively, leading to about 18 followup questions. *Id.*, at 72–75, 86–88, 179–180. Jones' remaining questions were mostly about her being late to court and her untruthful answer regarding the death penalty on the jury questionnaire. *Id.*, at 75, 180–182. Finally, nearly all of Cunningham's questions were about her work with Flowers' sister. *Id.*, at 83–85, 130–133. Any reasonable prosecutor would have followed up on these issues, and the majority does not cite even a single question that it thinks suggests racial discrimination.

The majority's comparison of the State's questions to Copper with its questions to several white jurors is baseless. As an initial matter, Flowers forfeited this argument by not making it at the trial court. See *supra*, at 330–331; App. 235–238. And as the Court has previously explained, "a retrospective comparison of jurors based on a cold appellate rec-

ord may be very misleading when alleged similarities were not raised at trial" because "an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable." *Snyder*, 552 U. S., at 483.

Even if Flowers had not forfeited this argument, it is meritless. As previously discussed, Copper worked with two of Flowers' family members and testified that she could "lean toward" Flowers and would not decide the case "with an open mind." App. 190; see *id.*, at 78. These answers justified heavier questioning than was needed for Chesteen, the white bank teller who occasionally served Flowers' family members. Moreover, the State *did* ask Chesteen and Lester, a white juror who also worked at the bank, "follow-up questions about [their] relationships with Flowers' family." *Ante*, at 309; see App. 83, 86.[8] I have already addressed Lester and Waller, another white juror who had connections to the victims, and why the State did not need to ask them more questions. See *supra*, at 327–330. The majority also references Larry Blaylock and Marcus Fielder, two other white prospective jurors who "had relationships with defense witnesses." *Ante*, at 309. As for Blaylock, the majority makes no attempt to say what those "relationships" were, presumably because the only relationship discussed at the *Batson* hearing was Blaylock's 30-year friendship with the *prosecutor's* primary investigator—whom the defense planned to call as a hostile witness. App. 215; Tr. 1041–1042. The investigator was also his uncle by marriage, *id.*, at 1078, and the defense asked Blaylock some 46 questions, *id.*, at 1041–1042, 1078, 1182–1187. Likewise, Fielder's only relationship discussed at the *Batson* hearing was his work for a

[8] The majority seems to draw a distinction between individual questions asked during group *voir dire* and individual questions asked during individual *voir dire*. *Ante*, at 307–309. I cannot imagine why this distinction would matter here. The majority does not explain its reasoning, and its statistics treat these questions the same.

prosecution witness who had investigated the murders. See App. 215. The defense felt it necessary to ask Fielder about 30 followup questions. Tr. 1255–1260. In short, despite the majority's focus on Copper, *ante*, at 309, no one could (or did) compare the State's need to question her with its need to question these jurors.

Next, the majority complains that the State had a witness testify that Cunningham worked closely with Flowers' sister. According to the majority, "[t]he State apparently did not conduct similar investigations of white prospective jurors." *Ibid.* Putting aside that the majority offers no record support for this claim, the majority does not tell us what investigation was performed, much less which white jurors could or should have been similarly investigated. As far as the record reveals, the State made one call to Cunningham's employer on the morning of the hearing to ask a single question: Where did Cunningham work in relation to Flowers' sister? App. 149, 154. I see no reason to assume that the State failed to conduct any other single-phone-call "investigations" in this high-profile trial. Nor am I aware of white jurors who worked in any proximity to Flowers' family members. If the majority is going to infer racial bias from the State's attempt to present the truth in court—particularly in a case where juror perjury had been a problem, see *supra*, at 337, n. 7—it ought to provide a sound basis for its criticism.

Finally, to support its view that "[t]he difference in the State's approaches to black and white prospective jurors was stark," the majority asserts that "[w]hite prospective jurors who admitted that they or a relative had been convicted of a crime were accepted without apparent further inquiry by the State." *Ante*, at 309. The majority again cites nothing to support this assertion, and the record does not support it. Three of the struck black jurors had relatives with a criminal conviction. See Tr. 883 (Burnside); *id.*, at 885 (Copper); 2d Supp. Record 255b (Cunningham). The State asked no questions to either Copper or Cunningham on this point, and it

asked three questions to Burnside about her son's robbery conviction. See App. 144–145. The State treated white jurors similarly. For example, the State asked three questions to Suzanne Winstead about a nephew's drug charges, Tr. 1190–1191; four questions to Sandra Hamilton about crimes of her first cousins, *id.*, at 977; and two questions to Larry Blaylock about a cousin who committed murder, *id.*, at 978–979.[9]

Because any "disparate questioning or investigation of black and white prospective jurors" here "reflect[s] ordinary race-neutral considerations," *ante*, at 310, this factor provides no evidence of racial discrimination in jury selection below.

E

If this case required us to decide whether the state courts were correct that no *Batson* violation occurred here, I would find the case easy enough. As I have demonstrated, the evidence overwhelmingly supports the conclusion that the State did not engage in purposeful race discrimination. Any competent prosecutor would have struck the jurors struck below. Indeed, some of the jurors' conflicts might even have justified for-cause strikes. But this case is easier yet. The question before us is not whether we "'would have decided the case differently,'" *Easley* v. *Cromartie*, 532 U. S. 234, 242 (2001), but instead whether the state courts were *clearly* wrong. And the answer to that question is obviously no.

The Court has said many times before that "[t]he trial court has a pivotal role in evaluating *Batson* claims." *Snyder*, 552 U. S., at 477. The ultimate question in *Batson* cases—whether the prosecutor engaged in purposeful dis-

[9] The majority ominously warns that, through questioning, prosecutors "can try to find some pretextual reason . . . to justify what is in reality a racially motivated strike" and that "[p]rosecutors can decline to seek what they do not want to find about white prospective jurors." *Ante*, at 310. I would not so blithely impute single-minded racism to others. Doing so cheapens actual cases of discrimination.

crimination—"involves an evaluation of the prosecutor's credibility," and "'the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge.'" *Ibid.* The question also turns on "a juror's demeanor," "making the trial court's firsthand observations of even greater importance." *Ibid.* "[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson* v. *Bessemer City*, 470 U. S. 564, 575 (1985).

Because the trial court is best situated to resolve the sensitive questions at issue in a *Batson* challenge, "a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Snyder*, *supra*, at 477; see *Foster*, 578 U. S., at 500. Our review is particularly deferential where, as here, "an intermediate court reviews, and affirms, a trial court's factual findings." *Easley*, *supra*, at 242.

Under this clear-error standard of review, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, *supra*, at 574; see also *Cooper* v. *Harris*, 581 U. S. 285, 293 (2017). The notion that it is "impermissible" to adopt the view of the evidence that I have outlined above is incredible. Besides being supported by carefully reasoned opinions from both the trial court and the Mississippi Supreme Court—opinions that, unlike the majority's, consider all relevant facts and circumstances—that view is *at a minimum* consistent with the factual record. At the *Batson* hearing, the State offered "a coherent and facially plausible story that is not contradicted" by the record, and the trial court's "decision to credit" such a story "can virtually never be clear error." *Anderson*, *supra*, at 575. The trial court reasonably understood the supposedly "dramatically disparate" questioning to be explained by the circumstances of this case—circumstances that the majority does not dispute.

Likewise, the trial court reasonably did not view any picayune mistakes by the State to be compelling evidence of racial discrimination. (Of course, neither did the defense, which is presumably why it did not make that argument. But the clear-error and forfeiture doctrines are speed bumps en route to the Court's desired destination.) Yet the Court discovers "clear error" based on its own review of a near-decade-old record. The majority apparently thinks that it is in a better position than the trial court to judge the tone of the questions and answers, the demeanor of the attorneys and jurors, the courtroom dynamic, and the culture of Winona, Mississippi.

III

Given that there was no evidence of race discrimination in the trial here, the majority's remaining explanation for its decision is conduct that took place *before* this trial. The majority builds its decision around the narrative that this case has a long history of race discrimination. This narrative might make for an entertaining melodrama, but it has no basis in the record. The history, such as it is, does not come close to carrying Flowers' burden of showing that the state courts clearly erred.

A

The State exercised 50 peremptory strikes in Flowers' previous trials. As the case comes to us, 49 of those strikes were race neutral. If this history teaches us anything, it is that we should not assume the State strikes jurors based on their race.

Flowers' first trial was for the murder of Bertha Tardy only. In that trial, the State exercised peremptory strikes on five black jurors and seven white jurors. App. 35. The trial court found that Flowers had not made out even a prima facie *Batson* case, App. 12, n. 3, much less showed purposeful race discrimination in any of the State's strikes. Thus, as this case comes to us, all of the State's strikes in this trial were race neutral.

What the majority calls the second trial is actually Flowers' first trial for another murder—that of Bobo Stewart. During jury selection, the State exercised peremptory strikes on five black jurors and two white jurors; the trial court disallowed one of the State's strikes under *Batson*. App. 35; *id.*, at 17–19. Flowers was convicted and apparently did not appeal on *Batson* grounds. Eventually, the Mississippi Supreme Court reversed Flowers' convictions from the first two trials for reasons unrelated to jury selection. The court held that certain evidence relevant to all four murders was improperly admitted. *Flowers* v. *State*, 773 So. 2d 309, 317, 319–324 (Miss. 2000); *Flowers* v. *State*, 842 So. 2d 531, 538, 539–550 (Miss. 2003).

The State next tried Flowers for all four murders together. In this "third" trial—actually the first trial for the murders of Robert Golden and Carmen Rigby—the State struck 15 black jurors. App. 35. The trial court found no *Batson* violations. *Flowers* v. *State*, 947 So. 2d 910, 916 (Miss. 2007) (plurality opinion). On appeal, Flowers did not challenge four of the strikes, *id.*, at 918, and the Mississippi Supreme Court unanimously upheld the trial court's ruling as to nine of the other strikes, see *id.*, at 918–935. Four justices, constituting a plurality of the court, would have held that two strikes violated *Batson*, 947 So. 2d, at 926, 928; one justice concurred only in the judgment because she "d[id] not agree" with the "plurality" "that this case is reversible on the *Batson* issue alone," *id.*, at 939 (Cobb, P. J., concurring in result); and four justices would have held that no strikes violated *Batson*, 947 So. 2d, at 942–943 (Smith, C. J., dissenting). If the concurring justice thought any strikes were impermissible, *Batson* would have required her to reverse on that basis.

Thus, the Court is wrong multiple times over to say that the Mississippi Supreme Court "conclud[ed] that the State had again violated *Batson* by discriminating on the basis of race in exercising all 15 of its peremptory strikes against 15

black prospective jurors." *Ante*, at 291. That court unanimously concluded that 13 strikes were race neutral, and a majority concluded that the remaining two strikes did not violate *Batson*. Therefore, neither the trial court nor the Mississippi Supreme Court found any *Batson* violation in this third trial—all 15 strikes were race neutral.[10]

In the next two trials, Flowers apparently did not even allege a *Batson* violation. In the "fourth" trial, the State struck 11 black jurors but did not exercise its three remaining strikes; 5 black jurors were seated. App. 28–29, 35. In the "fifth" trial, the State struck five jurors, but Flowers is unable to identify the race of these jurors, and three black jurors were seated. Brief for Petitioner 13. Thus, up to the present trial, the State had sought to exercise 50 peremptory strikes, 36 on potential black jurors. Finally, in this trial, the State struck five black jurors and one white juror; one black juror sat on the jury, and one black juror was an alternate.

According to the majority, "the State's use of peremptory strikes in Flowers' first four trials reveal[s] a blatant pattern

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[10] The Court repeatedly and inaccurately attributes statements by the plurality to the Mississippi Supreme Court—or deems those statements part of a "lead opinion," *ante*, at 287, 291, 305, even though a majority of that court disagreed in relevant part. The Court also takes the plurality's statements out of context. For instance, three times the Court quotes the plurality's statement that "'[t]he instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge.'" *Ibid.* But that statement was focused solely on the fact that "[t]he prosecutor exercised all fifteen of his peremptory strikes on African-Americans." *Flowers*, 947 So. 2d, at 936. One could just as easily say that Flowers' own strikes here—11 whites, zero blacks—present an overwhelming prima facie case of racial discrimination. Tr. of Oral Arg. 57 (admitting that Flowers' trial counsel "only exercised peremptories against white jurors"). As the Court understands, a prima facie case is only the first step of *Batson*, *ante*, at 298, and a majority of the Mississippi Supreme Court in the third trial found that Flowers failed to carry his burden of proving purposeful racial discrimination as to *any* strike.

of striking black prospective jurors." *Ante*, at 305. The majority claims that "[o]ver the course of the first four trials, there were 36 black prospective jurors against whom the State could have exercised a peremptory strike," and "[t]he State tried to strike all 36." *Ibid.* The majority's argument is wrong on several levels.

First, the majority is wrong on the numbers. The majority repeatedly says that over "the six trials combined," "the State struck 41 of the 42 black prospective jurors it could have struck." *Ante*, at 315; see *ante*, at 288. Yet in the fourth trial, according to Flowers himself, the State did not exercise available peremptory strikes on at least three black jurors. See App. 28–29. Moreover, the majority does not know the races of the struck jurors in the fifth trial. Given that at least three black jurors were seated and that the State exercised only five strikes, it would appear that the State did not exercise available strikes against at least three black jurors. Finally, in the most recent trial, the State tendered two black jurors for service on the jury, one of whom served as an alternate. (The majority's strike numbers include strikes of alternates, so its juror numbers should too.) However the majority arrived at its numbers, the record tells a different story.[11]

Second, the Court says that "[t]he State's actions in the first four trials necessarily inform our assessment of the State's intent," for "[w]e cannot ignore that history." *Ante*, at 306–307. Putting aside that no court below ignored the history, the majority completely ignores Flowers' failure to challenge

[11] Rather than explain its numbers, the Court points out that when pressed at oral argument, the State agreed that 41 of 42 potential black jurors had been stricken. *Ante*, at 288, 305. No one else—not even Flowers—has agreed with that statistic. See Brief for Petitioner 32; App. 35. Flowers certainly did not present it to the state courts. The question before us is whether those courts clearly erred, and in reviewing their decisions, we must affirm "'if the result is correct'" based on the actual record. *NLRB* v. *Kentucky River Community Care, Inc.*, 532 U. S. 706, 722, n. 3 (2001).

the State's actions in the fifth trial—the one that immediately preceded this one. Flowers bears the burden of proving racial discrimination, and the reason information about the fifth trial is not "available," *ante*, at 306, is that Flowers failed to present it. Perhaps he did not *want* to present it because the State struck only white jurors—who knows? Regardless, this failure must count against Flowers' claim. Surely a party making a *Batson* claim cannot gather data from select trials and present only favorable snippets.

Third, and most importantly, that the State previously sought to exercise 36 strikes against black jurors does not "speak loudly" in favor of discrimination here, *ante*, at 305, because 35 of those 36 strikes were race neutral. By the majority's own telling, the trial court may "consider historical evidence of the State's *discriminatory* peremptory strikes from past trials." *Ante*, at 304 (emphasis added). As I have shown, 35 of 36 strikes were not "discriminatory peremptory strikes." The bare number of black-juror strikes is relevant only if one eliminates other explanations for the strikes, cf. *supra*, at 334–335, but prior adjudications (and Flowers' failure to even object to some strikes) establish that legitimate reasons explained all but one of them. Is the majority today holding that the prior courts all committed clear error too? And what about the strikes that even Flowers did not object to—is the majority *sua sponte* holding that the State was engaged in purposeful racial discrimination as to those strikes? The majority's reliance on race-neutral strikes to show discrimination is judicial alchemy.

B

The only incident in the history of this case even hinting at discrimination was that a trial judge 20 years ago prevented the State from striking one black juror in a case involving only one of Flowers' crimes. If this single impermissible strike could provide evidence of purposeful race discrimination in a different trial 11 years later involving

different murders (and victims of different races), it is surely the weakest of evidence. Even Flowers concedes that a single "*Batson* violation 20 years ago" would be only "weakly probative." Tr. of Oral Arg. 19–20. That is the precise situation here. And this "weakly probative" single strike certainly does not overcome the complete absence of evidence of purposeful race discrimination in this trial. We know next to nothing about this strike, for Flowers has not even provided us with a transcript of the jury selection from that trial. And the trial court's ruling on the strike was never reviewed on appeal.

Pretending for a moment that the concurring justice in the third trial had voted differently than she did, the history still could not overcome the absence of evidence of purposeful race discrimination in *this* trial. Flowers forthrightly acknowledged that he needed to show "discrimination in *this* trial in order to have a *Batson* violation." *Id.*, at 23 (emphasis added). At a minimum, the state courts' finding—that the history does not carry Flowers' burden of proving purposeful race discrimination here—is not clearly erroneous. The courts below were presented with Flowers' view of the history, and even accepting that view and "[t]aking into account the 'historical evidence' of past discrimination," the Mississippi Supreme Court held that the trial court did not err "in finding that the State did not violate *Batson*." 240 So. 3d, at 1135; see *id.*, at 1122–1124. The majority simply disregards this assessment by the state courts.

IV

Much of the Court's opinion is a paean to *Batson* v. *Kentucky*, which requires that a duly convicted criminal go free because a juror was arguably deprived of his right to serve on the jury. That rule was suspect when it was announced, and I am even less confident of it today. *Batson* has led the Court to disregard Article III's limitations on standing by giving a windfall to a convicted criminal who, even under

Batson's logic, suffered no injury. It has forced equal protection principles onto a procedure designed to give parties absolute discretion in making individual strikes. And it has blinded the Court to the reality that racial prejudice exists and can affect the fairness of trials.

A

In *Batson*, this Court held that the Equal Protection Clause prohibits the State from "challeng[ing] potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case." 476 U. S., at 89. "[I]ndividual jurors subjected to racial exclusion have the legal right to bring suit on their own behalf." *Powers* v. *Ohio*, 499 U. S. 400, 414 (1991). To establish standing to assert this equal protection claim in a separate lawsuit, the juror would need to show that the State's action caused him to suffer an injury in fact, and a likelihood that a favorable decision will redress the injury. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992). Flowers, however, was not the excluded juror. And although he is a party to an ongoing proceeding, "'"standing is not dispensed in gross"'"; to the contrary, "'a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.'" *Town of Chester* v. *Laroe Estates, Inc.*, 581 U. S. 433, 439 (2017).

Flowers should not have standing to assert the excluded juror's claim. He does not dispute that the jury that convicted him was impartial, see U. S. Const., Amdt. 6, and as the Court has said many times, "'[d]efendants are not entitled to a jury of any particular composition,'" *Holland* v. *Illinois*, 493 U. S. 474, 483 (1990). He therefore suffered no legally cognizable injury. The only other plausible reason a defendant could suffer an injury from a *Batson* violation is if the Court thinks that he has a better chance of winning if more members of his race are on the jury. But that thinking relies on the very assumption that *Batson* rejects: that ju-

rors might "'be partial to the defendant because of their shared race.'" *Ante*, at 299 (quoting *Batson*, *supra*, at 97). Moreover, it cannot be squared with the Court's later decisions, which hold that "race is irrelevant to a defendant's standing to object to the discriminatory use of peremptory challenges." *Powers*, 499 U. S., at 416 (holding that a white defendant has standing to challenge strikes of black jurors).

Today, the Court holds that Carolyn Wright was denied equal protection by being excluded from jury service. But she is not the person challenging Flowers' convictions (she would lack standing to do so), and I do not understand how Flowers can have standing to assert her claim. Why should a "denial of equal protection to other people" that does "not affect the fairness of that trial" mean that "the defendant must go free"? *Id.*, at 431 (Scalia, J., dissenting).

In *Powers*, the Court relied on the doctrine of third-party standing. As an initial matter, I doubt "whether a party who has no personal constitutional right at stake in a case should ever be allowed to litigate the constitutional rights of others." *Kowalski* v. *Tesmer*, 543 U. S. 125, 135 (2004) (THOMAS, J., concurring); see also *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582, 629–633 (2016) (THOMAS, J., dissenting).

Even accepting the notion of third-party standing, it is hard to see how it could be satisfied in *Batson* cases. The Court's precedents require that a litigant asserting another's rights have suffered an "'injury in fact'" and have "a close relation" to the third party. *Powers*, *supra*, at 411. As shown, Flowers suffered no injury in fact under the Court's precedents. Moreover, in the ordinary case, the defendant has no relation whatsoever to the struck jurors. (Here, as it happens, all the struck jurors knew Flowers or his family, but that hardly *helps* his *Batson* claim.)

In *Powers*, the Court concluded that defendants and struck jurors share a "common interest." 499 U. S., at 413. But like most defendants, Flowers' interest is in avoiding

prison (or execution). A struck juror, by contrast, is unlikely to feel better about being excluded from jury service simply because a convicted criminal may go free. And some potential jurors, like Flancie Jones here, "really and truly . . . don't want to" serve on a jury in the first place. App. 181 (emphasis added); see also *Hayes* v. *Missouri*, 120 U. S. 68, 71 (1887) (referring to "an unfortunate disposition on the part of business men to escape from jury duty"). If Flowers had succeeded on his *Batson* claim at trial and forced Jones onto the jury, it seems that *he*—her supposed third-party representative with a "common interest"—would have inflicted an injury on her.

Our remedy for *Batson* violations proves the point. The convicted criminal, who suffered no injury, gets his conviction vacated.[12] And even if the struck juror suffered a cognizable injury, but see *Powers*, *supra*, at 423–426 (Scalia, J., dissenting), that injury certainly is not redressed by undoing the valid conviction of another. Under Article III, Flowers should not have standing.

B

The more fundamental problem is *Batson* itself. The "entire line of cases following *Batson*" is "a misguided effort to remedy a general societal wrong by using the Constitution to regulate the traditionally discretionary exercise of peremptory challenges." *Campbell* v. *Louisiana*, 523 U. S. 392, 404, n. 1 (1998) (THOMAS, J., concurring in part and dissenting in part). "[R]ather than helping to ensure the fairness of criminal trials," *Batson* "serves only to undercut that fairness by emphasizing the rights of excluded jurors at the expense of the traditional protections accorded criminal

[12] The Court has never explained "why a violation of a third party's right to serve on a jury should be grounds for reversal when other violations of third-party rights, such as obtaining evidence against the defendant in violation of another person's Fourth or Fifth Amendment rights, are not." *Campbell* v. *Louisiana*, 523 U. S. 392, 405 (1998) (THOMAS, J., concurring in part and dissenting in part).

defendants of all races." *Campbell*, *supra*, at 404, n. 1. I would return to our pre-*Batson* understanding—that race matters in the courtroom—and thereby return to litigants one of the most important tools to combat prejudice in their cases.

1

In *Strauder* v. *West Virginia*, 100 U. S. 303 (1880), the Court invalidated a state law that prohibited blacks from serving on juries. In doing so, we recognized that the racial composition of a jury could affect the outcome of a criminal case. See *id.*, at 308–309. The Court explained that "[i]t is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." *Id.*, at 309. Thus, we understood that allowing the defendant an opportunity to "secur[e] representation of the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial." *Georgia* v. *McCollum*, 505 U. S. 42, 61 (1992) (THOMAS, J., concurring in judgment).

In *Swain* v. *Alabama*, 380 U. S. 202 (1965), the Court held that individual peremptory strikes could not give rise to an equal protection challenge. *Swain* followed *Strauder* in assuming that race—like other factors that are generally unsuitable for the government to use in making classifications—can be considered in peremptory strikes: "In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause." *Swain*, 380 U. S., at 221. That is because the peremptory "challenge is 'one of the most important of the rights secured to the accused.' " *Id.*, at 219. Based on its long history, the peremptory system "affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial." *Id.*, at 212; see *id.*, at 212–219. The strike both "eliminate[s]

extremes of partiality on both sides" and "assure[s] the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." *Id.*, at 219. Because this system, "in and of itself, provides justification for striking any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants or those with blue eyes," *id.*, at 212, we concluded that an equal protection challenge was unavailable against individual peremptory strikes.

Then, in a departure from the previous century of jurisprudence, the Court moved its focus from the protections accorded the *defendant* to the perceptions of a hypothetical struck *juror*. In *Batson*, the Court concluded that the government could not exercise individual strikes based solely on "the assumption—or [the] intuitive judgment—that [jurors] would be partial to the defendant because of their shared race." 476 U. S., at 97. The Court's opinion in *Batson* equated a law categorically excluding a class of people from jury service with the use of discretionary peremptory strikes to remove members of that class: "Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black." *Ibid.* (citation omitted). *Batson* repeatedly relies on this analogy. See *id.*, at 86, 89; *id.*, at 87 ("A person's race simply is unrelated to his fitness as a juror" (internal quotation marks omitted)); see also *ante*, at 299 (quoting *Batson*, *supra*, at 104–105 (Marshall, J., concurring)); *Powers*, 499 U. S., at 410 ("Race cannot be a proxy for determining juror bias or competence").

But this framing of the issue ignores the nature and basis of the peremptory strike and the realities of racial prejudice. A peremptory strike reflects no judgment on a juror's competence, ability, or fitness. Instead, the strike is exercised

based on intuitions that a potential juror may be less sympathetic to a party's case. As Chief Justice Burger emphasized, "venire-pool exclusion bespeaks *a priori* across-the-board total unfitness, while peremptory-strike exclusion merely suggests potential partiality in a particular isolated case." *Batson*, *supra*, at 122–123 (dissenting opinion) (internal quotation marks omitted); accord, *Powers*, *supra*, at 424 (Scalia, J., dissenting). "[T]he question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is *in fact* partial, but whether one from a different group is *less likely* to be." *Swain*, 380 U. S., at 220–221 (emphasis added). Therefore, "veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges"; instead, "they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried." *Id.*, at 221.

Batson rejects the premise that peremptory strikes can be exercised on the basis of generalizations and demands instead "an assessment of individual qualifications." 476 U. S., at 87. The Court's *Batson* jurisprudence seems to conceive of jury selection more as a project for affirming "the dignity of persons" than as a process for providing a jury that is, including in the parties' view, fairer. *Powers*, *supra*, at 402; see *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 631 (1991); see also *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 140–142 (1994).

2

Batson's focus on individual jurors' rights is wholly contrary to the rationale underlying peremptory challenges. And the application of equal protection analysis to individual strikes has produced distortions in our jurisprudence that are symptomatic of its poor fit, both as a matter of common sense and the protections traditionally accorded litigants.

The Court did not apply equal protection principles to individual peremptory strikes until more than 100 years after

the Fourteenth Amendment was ratified. Once it did, it quickly extended *Batson* to civil actions, strikes by criminal defendants, and strikes based on sex. *Edmonson*, *supra*; *McCollum*, 505 U. S. 42; *J. E. B.*, *supra*. But even now, we do not apply generally applicable equal protection principles to peremptory strikes. For example, our precedents do not apply "strict scrutiny" to race-based peremptory strikes. And we apply "the same protection against [sex] discrimination as race discrimination" in reviewing peremptory strikes, *J. E. B.*, *supra*, at 145, even though sex is subject to "heightened" rather than "strict" scrutiny under our precedents. Finally, we have not subjected all peremptory strikes to "rational basis" review, which normally applies absent a protected characteristic. *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 440–442 (1985); see generally *Batson*, *supra*, at 123–125 (Burger, C. J., dissenting); *J. E. B.*, *supra*, at 161 (Scalia, J., dissenting). Thus, the Court's own jurisprudence seems to recognize that its equal protection principles do not naturally apply to individual, discretionary strikes.

Now that we have followed *Batson* to its logical conclusion and applied it to race- and sex-based strikes without regard to the race or sex of the defendant, it is impossible to exercise a peremptory strike that cannot be challenged by the opposing party, thereby requiring a "neutral" explanation for the strike. But requiring an explanation is inconsistent with the very nature of peremptory strikes. Peremptory strikes are designed to protect against fears of partiality by giving effect to the parties' intuitions about jurors' often-unstated biases. "[E]xercised on grounds normally thought irrelevant to legal proceedings or official action," like "race, religion, nationality, occupation or affiliations," *Swain*, *supra*, at 220, they are a form of action that is by nature "arbitrary and capricious," 4 W. Blackstone, Commentaries on the Laws of England 346 (1769) The strike must "'be exercised with full freedom, or it fails of its full purpose.'" *Lewis* v. *United States*, 146 U. S. 370, 378 (1892). Because

the strike may be exercised on as little as the "'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,'" *id.*, at 376, reasoned explanation is often impossible. And where scrutiny of individual strikes is permitted, the strike is "no longer . . . peremptory, each and every challenge being open to examination." *Swain*, *supra*, at 222.

In sum, as other Members of this Court have recognized, *Batson* charted the course for eliminating peremptory strikes. See, *e. g.*, *Rice* v. *Collins*, 546 U. S. 333, 344 (2006) (BREYER, J., concurring); *Batson*, *supra*, at 107–108 (Marshall, J., concurring). Although those Justices welcomed the prospect, I do not. The peremptory system "has always been held essential to the fairness of trial by jury." *Lewis*, *supra*, at 376. And the basic premise of *Strauder*—that a juror's racial prejudices can make a trial less fair—has not become "obsolete." *McCollum*, 505 U. S., at 61 (opinion of THOMAS, J.). The racial composition of a jury matters because racial biases, sympathies, and prejudices still exist. This is not a matter of "assumptions," as *Batson* said. It is a matter of reality.[13] The Court knows these prejudices exist. Why else would it say that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias"? *Turner* v. *Murray*, 476 U. S. 28, 36–37 (1986).[14] For that matter, why else say here that

[13] Academic studies appear to support this commonsense proposition. See, *e. g.*, Carter & Mazzula, Race and Racial Identity Status Attitudes, 11 J. Ethnicity Crim. Justice 196, 211 (2013) ("[R]acial bias exists in juror decision making"); Ellsworth & Sommers, Race in the Courtroom, 26 Personality & Soc. Psychol. Bull. 1367, 1367–1379 (2000). Cf. *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 148–149 (1994) (O'Connor, J., concurring) ("We know that like race, gender matters").

[14] It is telling that Flowers here sought a new trial because the trial court supposedly failed to allow sufficient questioning on racial prejudice. See Record 2936. Evidently Flowers was operating "on the assumption that" jurors might "be biased in a particular case simply because the de-

"Flowers is black" and the "prosecutor is white"? *Ante*, at 289. Yet the Court continues to apply a line of cases that prevents, among other things, black defendants from striking potentially hostile white jurors. I remain "certain that black criminal defendants will rue the day that this Court ventured down this road that inexorably will lead to the elimination of peremptory strikes." *McCollum*, *supra*, at 60 (opinion of THOMAS, J.).

Instead of focusing on the possibility that a juror will misperceive a peremptory strike as threatening his dignity, I would return the Court's focus to the fairness of trials for the defendant whose liberty is at stake and to the People who seek justice under the law.

* * *

If the Court's opinion today has a redeeming quality, it is this: The State is perfectly free to convict Curtis Flowers again. Otherwise, the opinion distorts our legal standards, ignores the record, and reflects utter disrespect for the careful analysis of the Mississippi courts. Any competent prosecutor would have exercised the same strikes as the State did in this trial. And although the Court's opinion might boost its self-esteem, it also needlessly prolongs the suffering of four victims' families. I respectfully dissent.

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fendant is black." *Batson* v. *Kentucky*, 476 U. S. 79, 97 (1986). Perhaps unsurprisingly, then, he exercised peremptory strikes against 11 white jurors and zero black jurors.

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 357 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

JUNE 20, 2019

Certiorari Granted

No. 18–1334. FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO *v.* AURELIUS INVESTMENT, LLC, ET AL.;

No. 18–1475. AURELIUS INVESTMENT, LLC, ET AL. *v.* COMMONWEALTH OF PUERTO RICO ET AL.;

No. 18–1496. OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL TITLE III DEBTORS OTHER THAN COFINA *v.* AURELIUS INVESTMENT, LLC, ET AL.;

No. 18–1514. UNITED STATES *v.* AURELIUS INVESTMENT, LLC, ET AL.; and

No. 18–1521. UNIÓN DE TRABAJADORES DE LA INDUSTRIA ELÉCTRICA Y RIEGO, INC. *v.* FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO ET AL. C. A. 1st Cir. Certiorari granted. Cases consolidated, and will be set for argument in the second week of the October 2019 argument session.

Parties challenging the First Circuit's ruling on the Appointments Clause issue shall file an opening brief on that issue on or before Thursday, July 25, 2019. Briefs are to bear a light blue cover and are limited to 15,000 words.

Parties supporting the First Circuit's ruling on the Appointments Clause issue and challenging the ruling on the *de facto* officer doctrine issue shall file a consolidated opening brief on or before Thursday, August 22, 2019. Briefs are to bear a light red cover and are limited to 20,000 words.

Parties challenging the First Circuit's ruling on the Appointments Clause issue and supporting the ruling on the *de facto* officer doctrine issue shall file a consolidated opening brief and reply on or before Thursday, September 19, 2019. Briefs are to bear a yellow cover and are limited to 13,000 words.

Parties challenging the First Circuit's ruling on the *de facto* officer doctrine issue shall file with the Clerk and serve upon

counsel a reply brief limited to that issue on or before 2 p.m., Tuesday, October 8, 2019. Briefs are to bear a tan cover and are limited to 6,000 words.

Amicus curiae briefs challenging the First Circuit's ruling on the Appointments Clause issue and/or supporting the ruling on the *de facto* officer doctrine issue are to be filed on or before Thursday, August 1, 2019. Briefs are to bear a light green cover and are limited to 9,000 words. *Amicus curiae* briefs supporting the First Circuit's ruling on the Appointments Clause issue and/or challenging the ruling on the *de facto* officer doctrine issue are to be filed on or before Thursday, August 29, 2019. Briefs are to bear a dark green cover and are limited to 9,000 words. An *amicus curiae* shall file only a single brief. Reported below: 915 F. 3d 838.

Certiorari Denied

No. 18–9745 (18A1345). WILSON *v.* GEORGIA. Sup. Ct. Ga. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

No. 18–9746 (18A1346). WILSON *v.* FORD, WARDEN. Sup. Ct. Ga. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.